

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MRS. GLENN D. HART and
GLENN D. HART,

Appellants,

vs.

WALTER ADAIR, J. T. EPPERLY, JAMES
P. BURNS, F. S. GREEN and L. B. WAL-
LACE,

Appellees.

and

W. C. HARDING LAND COMPANY, a cor-
poration,

Appellant,

vs.

MRS. GLENN D. HART and
GLENN D. HART,

Appellees.

Transcript of Record on Appeal

On Appeal from the District Court of the United
States for the District of Oregon.

Filed

NOV 24 1915

No. _____

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State of Oregon,
County of Douglas,—ss.

Due service of the within Citation is hereby accepted in Douglas County, Oregon, this 23rd day of April, 1915, by receiving a copy thereof, duly certified to as such by E. A. Lundburg, Attorney for Plaintiffs.

B. L. EDDY,

Attorney for Walter Adair,

J. T. Epperly, James P.

Burns, F. S. Green and

L. B. Wallace,

Defendants.

Filed April 24, 1915. G. H. Marsh, Clerk.

RECORD ON APPEAL—AGREED STATE-
MENT (UNDER EQUITY RULE 77)

*In the District Court of the United States for the Dis-
trict of Oregon.*

MARCH TERM, 1914.

BE IT REMEMBERED, That on the 9th day of March, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint (agreed statement thereof), in words and figures as follows, to-wit:

BILL IN EQUITY, NO. 6341.

MRS. GLENN D. HART AND GLENN D.
HART,

Plaintiffs,

vs.

W. C. HARDING LAND COMPANY, a corpora-
tion, WALTER ADAIR, J. T. EPPERLY,
JAMES P. BURNS, F. S. GREEN and L. B.
WALLACE,

Defendants.

To the Honorable Charles E. Wolverton and Robert
S. Bean, Judges for the District Court of the
United States, for the District of Oregon;

Mrs. Glenn D. Hart, wife of Glenn D. Hart, citi-
zens of the State of South Dakota, residing in Law-
rence County in said State, brings this, her bill, against
the Harding Land Company, a corporation, duly organ-
ized and existing under the laws of the State of Ore-
gon, and having its principal place of business at Rose-
burg in said State, and a citizen and inhabitant of the
Oregon District in same State, and Walter Adair, J. T.
Epperly, James P. Burns, F. S. Green and L. B.
Wallace, citizens of the State of Oregon, residing in
Douglas County in said State.

And plaintiff complains and says:

I.

That the plaintffs, Mrs. Glenn D. Hart and Glenn
D. Hart are now and have been during all times herein

mentioned wife and husband, and are citizens of the State of South Dakota, residing in Lawrence County, in said State; that the first cause of suit herein set out exists in favor of said plaintiff, Mrs. Glenn D. Hart; that the second cause of suit is by plaintiff as assignee, and that the assignor thereof, Glenn D. Hart, is a citizen of South Dakota residing in Lawrence County in said State; that the third cause of suit is by plaintiff as assignee and that the assignor thereof, Mrs. Ella Peterson, is a citizen of the State of Colorado, residing in Gilpin County in said State; that each of said persons so named as assignors were, and are now, competent to maintain a suit against defendants as if no such assignment had been made; that this is a suit in equity and that the aggregate amount in dispute herein exceeds the sum of Three Thousand (\$3000.00) Dollars exclusive of interest and costs, and that this cause is a controversy wholly between citizens of different states.

II.

That on the 24th day of March, 1910, and for some time prior thereto, the defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, were, and had been, the owners in fee simple of that parcel of real property, situated in the County of Douglas, State of Oregon, platted and known as "Plat 'D' Roseburg Home Orchard Tracts."

That said owners of said property under and by virtue of a certain agreement by and between said owners and the W. C. Harding Land Company, a cor-

poration, organized and existing under the laws of the State of oregon, granted a certain beneficial interest and equity in said tract of land to said corporation, for the purposes of exploitation and sale of the same by tracts and parcels according to terms and conditions in said agreement set out and contained; that by the terms of said agreement said W. C. Harding Land Company was duly authorized to solicit purchasers and make sales thereof under the name of the W. C. Harding Land Company, and the proper officers of the same were to sign the contracts, but deeds thereof to be given by said owners by their trustee.

That as a consideration for said services rendered and to be rendered by said corporation thereunder, said beneficial interest and equity in said land, platted and known as Plat "D" Roseburg Home Orchards Tracts, Douglas County, Oregon, was granted by said owners and consisted of a certain per cent based upon an agreed minimum price of \$200.00 per acre; that in additon thereto said W. C. Harding Land Company were privileged and permitted to enter into contracts on its account and to its further benefit for the planting, cultivating and caring for orchards on said tracts with possible investors making same a part of any or all contracts of sale therefore.

That said arrangement and agreement between the defendants herein, the said owners, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace and the W. C. Harding Land Company, was in writing, and a copy thereof marked exhibit "A" is herewith attached and made a part of this complaint.

III.

That on or about the 24th day of March, 1910, at Deadwood, South Dakota, the plaintiff agreed to purchase of the defendants and the defendants agreed to sell and convey unto the plaintiff for the agreed price of Thirty Five Hundred (\$3500.00) Dollars, plaintiff paying at that time in cash, the first payment of said purchase price in the sum of Seven Hundred (\$700.00) Dollars and to pay the balance of said purchase price in installments of Seven Hundred (\$700.00) Dollars each on or before the 24th day of March of each and every year thereafter, together with six per cent (6%) per annum on deferred payments the following described property situated in the County of Douglas and State of Oregon, to-wit:

Lot Eighteen (18) of plat "D" of Roseburg Home Orchard Tracts of said County and State, as shown and designated on the duly recorded plat thereof on file in the office of the County Clerk of said Douglas County, Oregon.

The said agreement was in writing and a copy of the same is attached hereto marked Exhibit "B" and made a part of this complaint.

IV.

That on and about the 21st day of March, 1910, and prior to the making of said agreement, the defendants, by and through their representatives, agents and sales manager, T. W. Kendall, at Deadwood, South Dakota,

for the purpose of inducing plaintiff to purchase said Lot 18 and Plat "D" and to make said first payment thereon of Seven Hundred (\$700.00) Dollars, falsely and fraudulently stated and represented to plaintiff that said tract of land, comprising 10 acres and designated as Lot 18 plat "D" was worth the sum of \$3500.00; that the three tracts then remaining unsold including said Lot 18, namely lots 17, 18 and 19 of said Plat "D," were the choicest tracts of the entire plat; that the W. C. Harding Land Company had caused the soil of said lot with the rest of Plat "D" to be examined by an expert orchardist and caused the quality and character of the soil to be examined and reported upon by such expert, and that such examination and report showed soil particularly adapted to the growing of apples, and peaches, and that this tract had the best soil of that section of the Umpqua valley for such purpose and as good as the "volcanic ash" soil of the Wenatchee district of Washington; that the soil of said tract was a rich, deep loam and easily cultivated; that the tract was a sort of upland and had perfect drainage and would not need irrigation; that said agent exhibited certain panoramic views and blue prints of the Umpqua Valley and gave to this purchaser various illustrated and printed booklets, plats and maps, descriptive thereof, and published by said W. C. Harding Land Company representing that the statements set out and contained therein were true and applied with equal force to said tract of Plat "D"; that said Plat "D" was the choicest apple land of all the various plats and subdivisions theretofore handled and sold by his company,

the W. C. Harding Land Company, in that section of Oregon; that the W. C. Harding Land Company was thoroughly reliable and trustworthy and would not place on the market or offer for sale any parcel of land not suitable for the purposes represented; that it was not necessary to make a trip to Oregon to look over and examine said lot of Plat "D" but that it was entirely safe to buy it relying solely upon the statements of his company, and those made by him as agent without seeing said tract; that this purchaser could rely and depend upon said agent's representations so made regarding said lot of Plat "D" and to take his word for the quality and character of the soil and its adaptability for orchard purposes, as the same were true.

V.

That the representations and statements made by said defendants and their representatives, agents and sales manager, T. W. Kendall, as set out and alleged hereinbefore, were false and fraudulent, as hereinafter more particularly alleged and set forth; were so known to be false by defendants herein and were made with intent to deceive and defraud this plaintiff by inducing her to enter into said contract of purchase; that the plaintiff believing them to be true and relying and acting on said representations and statements so made, and reposing a special trust and confidence in the said agent and representatives making the same, entered into said contract of purchase of Lot 18 of Plat "D" aforesaid and paid thereon said cash payment of Seven Hundred (\$700.00) Dollars; that the plaintiff would

not have entered into said contract of purchase or made said payment thereon, had she known said representations and statements to be false.

VI.

That in addition to the said sum of Seven Hundred (\$700.00) Dollars by plaintiff paid to defendants as aforesaid on the purchase price of said lot and tract, plaintiff, by the terms of said contract has made further payments thereon as follows: June 2nd, 1911, Three Hundred Fifty (\$350.00) Dollars; April 16th, 1912, Four Hundred (\$400.00) Dollars; that on or about April 3rd, 1911, paid taxes assessed against said lot 18, for the year 1910, in the amount of Eight and 75/100 (\$8.75) Dollars and on or about April 3rd, 1912, paid taxes assessed thereon for the year 1911, in the amount of Eight and 75/100 (\$8.75) Dollars.

VII.

That the said representations and statements hereinbefore set forth were false in the following particulars: That said lot 18 of Plat "D" is not worth to exceed fifty (\$50.00) Dollars per acre and its use and value exists only for ordinary farm purposes when drained by tiling; that it lies very low, is bottom land and in a swale; that during high water in the rainy season, the nearby creek overflows and sweeps over parts of the lot; that the water stands on it during the winter months and does not drain away; that the surface soil is of a stiff, black, sticky nature, while the sub-soil is a sort of

joint clay, very tough and of the nature of "hard pan" through which water does not soak or drain; that the said soil is not adapted for orchard purposes and is entirely unfit for the growing or production of apples or peaches; that during the summer or dry season, said soil dries out, bakes and becomes very hard and cracks; that when plowed, it turns up in great chunks or clods and is almost impossible of cultivation; that its particular qualities, character and location, make it utterly worthless for orchard purposes, and to the growing and culture of apple or peach trees and to maintain the same.

VIII.

For the purpose of further persuading and inducing plaintiff to purchase said lot 18 of Plat "D" aforesaid and to make such cash payment of Seven Hundred (\$700.00) Dollars and other and subsequent payments thereon, the defendants, by its agents and officers and representatives, falsely stated and misrepresented to the plaintiff that if plaintiff would enter into said agreement and purchase lot 18 of Plat "D" and make said payments therefor, that they would plant said tract to Spitzenbergs and Newtown Pippin Apple Trees with peach tree fills not less than forty six to the acre, and give thorough cultivation and care to same in every detail necessary to the proper growing of said trees for the period of three years, and during said time to replace any trees that should, from any cause, die or become injured, and that they would deliver to this plaintiff, a full set, thoroughly cultivated planting as aforesaid, all of which statements and representations

and promises were false and fraudulent, which said defendants knew were false and fraudulent, which said defendants knew were false when made, but which were thus made to mislead and deceive plaintiff; that plaintiff relied upon the same as true and acted thereon to her damage as hereinafter set out.

IX.

That thereafter, to-wit: On or about the..... day of July, 1913, the plaintiff made a journey to Oregon and to said Douglas County, and for the first time discovered and learned that the said representations regarding said lot 18 of Plat "D" were false and untrue, and thereupon notified defendants that further payments would not be made on said contract on account of said fraud, and immediately sought restitution, by demanding of the defendants, the return of said purchase money and all payments made on said contract and because of it, and thereupon tendered back to defendants said contract of purchase, and offered to surrender up and cancel the same, and that plaintiff was then, and ever since has been, and now is, ready, willing and able to do that which in equity and good conscience she should do in reference to said agreement and the said lot and elected to rescind and cancel the said agreement with defendants and to quitclaim and reconvey by sufficient deed or otherwise, any and all title and estate in said lot by said plaintiff to defendants; but that defendants have failed to make amends or restitution in respect to said purchase and sale; although plaintiff has allowed a reasonable time to elapse in which

defendants could do so, with the assurance and on the understanding that something would be done by defendants to this end; that plaintiff has sustained damage by said acts of the defendants in the respective sums of Seven Hundred (\$700.00) Dollars; Three Hundred Fifty (\$350.00) Dollars; Four Hundred (\$400.00) Dollars; Eight $74/100$ (\$8.74) Dollars; Eight $74/100$ (\$8.74) Dollars, to-wit: the total sum of One Thousand Four Hundred Sixty Seven $48/100$ (\$1467.48) Dollars, with interest at the rate of six per cent per annum from dates of payment thereof.

For a further and second cause of suit Plaintiff alleges:

The Bill of Complaint then sets forth a second and similar cause of suit for the rescission for like reasons of a like contract made between said W. C. Harding Land Company and one Glenn D. Hart, husband of plaintiff, with respect to the sale of Lot 19 of said Plat "D" at the price of \$3500.00, of which said Glenn D. Hart paid to said W. C. Harding Land Company the following amounts, to-wit: \$700.00 March 24, 1910; \$700.00 June 2, 1911; \$8.75 April 3, 1911; and \$8.75 April 3, 1912; and it is alleged that under date of April 23, 1912, said Glenn D. Hart for a valuable consideration assigned to plaintiff all his right, title and interest, claim or demand in and to said contract, which assignment was duly approved by said W. C. Harding Company and by B. L. Eddy, Trustee.

For a further and third cause of suit:

The Bill of Complaint then sets forth a third cause of suit for the rescission for like reasons of a like contract made between W. C. Harding Land Company and one Ella Peterson, a citizen of the State of Colorado, with respect to the sale of Lot 17 of said Plat "D" at the price of \$3500.00, of which said Ella Peterson paid said W. C. Harding Land Company the following amounts, to-wit: \$100.00 April 15, 1910; \$300.00 May 15, 1910; \$400.00 November 1, 1910; \$25.00 December 1, 1910; and \$25.00 on the first day of each and every month thereafter to and including the 1st day of April, 1913, and \$8.75 on April 3, 1913, and \$50.00 on May 1, 1913; and it is alleged that prior to the institution of this suit said Ella Peterson, for a valuable consideration, assigned to plaintiff all her right, title and interest, claim or right of action in and to said contract.

WHEREFORE plaintiff prays the decree of the Court:

FIRST: That the agreements of purchase and sale as set out and referred to in the complaint be, in each case rescinded, cancelled and declared to be null and void.

SECOND: That the sum of Four Thousand Four Hundred Sixty Eight $\frac{45}{100}$ (\$4468.45) Dollars advanced and paid on said contract, as hereinbefore set forth, be declared to be due and owing from the said defendants and each of them to plaintiff herein.

THIRD: That interest at the rate of six per cent (6%) per annum on the said sum of Four Thousand Four Hundred Sixty Eight $45/100$ (\$4468.45) Dollars from the respective day and dates upon which payments and installments making up said aggregate, as hereinbefore set forth, were made to defendants, be declared to be due and owing from said defendants and each of them to plaintiff herein.

FOURTH: That plaintiff have judgment against defendants for the amount so found due, and for such other general relief as may to the Court be deemed just and equitable, and for costs and disbursements herein incurred.

To the end that the plaintiff may obtain the relief prayed for herein, she further prays the Court to grant her process by subpoena directed to the W. C. Harding Land Company, a corporation, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, *defendants* herein named, commanding them to appear and answer, though not under oath, all of the allegations of the bill herein filed, and to stand to, perform and abide such further order, direction and decree as may be made against them.

E. A. LUNDBERG,

E. R. LUNDBERG,

Attorneys for Plaintiff.

AND AFTERWARDS, to-wit, on the 8th day of April, 1914, there was duly FILED in said Court and Cause, an answer (agreed statement thereof) in words and figures as follows, to-wit:

Come now the Defendants Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace, and answering for themselves alone, make answer to the bill of complaint herein as follows, to-wit:

I.

These defendants admit that the plaintiffs are wife and husband.

II.

Deny that these defendants, as owner of the property referred to under paragraph II of the first alleged cause of suit, set forth in said bill of complaint, granted a certain or any beneficial interest or equity in said tract of land to said W. C. Harding Land Company, for the purpose of exploitation or sale or for any purpose, except as hereinafter alleged; deny that as a consideration for said services rendered and to be rendered by said corporation, thereunder or otherwise, any beneficial interest or equity in said land was granted by said owners or any of them, or consisted of a certain or any per cent based upon an agreed minimum or other price of two hundred dollars (\$200) per acre or any price per acre; deny that said W. C. Harding Land Company was privileged or permitted to enter into contracts on its account or to its further benefit for the

planting, cultivating or caring for orchards on said tracts with possible or any investors making the same part of any contract of sale therefor, except as hereinafter stated.

III.

Deny that on or about the 24th day of March, 1910, or at any time, at Deadwood, South Dakota, or elsewhere, the plaintiff agreed to purchase of these defendants, or any of them, or that these defendants or any of them agreed to sell or convey unto the plaintiff for any price whatever Lot 18 of Plat "D" of Roseburg Home Orchard Tracts, or any property whatever.

IV.

Deny that T. W. Kendall mentioned in paragraph IV of the first alleged cause of suit set forth in said bill of complaint ever was at any time or place the agent of these defendants or any of them and these defendants aver that these defendants and each of them are without knowledge as to whether or not on or about the 21st day of March, 1910, or at any time, the said T. W. Kendall at Deadwood, South Dakota, or elsewhere, for any purpose, falsely or fraudulently or otherwise stated or represented to plaintiff that said tract of land, comprising ten acres and designated as Lot 18 Plat "D" was worth the sum of thirty five hundred dollars (\$3500) or any sum whatsoever; or that the three tracts then remaining unsold, including the said lot 18 or any lots or tracts then remaining unsold, including the said lot 18 or any lots or tracts were the choicest tracts of the

entire plat; or as to whether or not the W. C. Harding Land Company had caused the soil of said lot with the rest or any of Plat "D" to be examined by an expert or any orchardist, or caused the quality or character of the soil to be examined or reported upon by such expert; or that such examination or report showed soil particularly or otherwise adapted to the growing of apples or peaches, or that this tract had the best or other kind of soil of that section of the Umpqua Valley for such or any purpose, or as good as "volcanic ash" or any soil of the Wenatchee District of Washington, or that the soil of said tract was a rich or deep loam, or easily cultivated, or that the said tract was a sort of upland, or had perfect drainage or would not need irrigation; or that said agent exhibited certain panoramic or other views or blue prints of the Umpqua Valley or gave to such alleged purchaser various or any illustrated or printed booklets, plats or maps, descriptive thereof or otherwise, or published by the said W. C. Harding Land Company, representing that the statements set out or contained therein were true or applied with equal or any force to said tract of Plat "D"; or that said Plat "D" was the choicest apple or other land of all or any of the various Plats or subdivisions theretofore handled or sold by the said W. C. Harding Land Company in that section of Oregon or elsewhere; or that the W. C. Harding Land Company was thoroughly or at all reliable or trustworthy or would not place on the market or offer for sale any parcel of land not suitable for the purposes represented; or that it was not necessary to make a trip to Oregon to look over or ex-

amine said lot of Plat "D," or that it was entirely or at all safe to buy it relying solely or otherwise upon the statements of his company, or those made by him as agent without seeing said tract or otherwise; or that said purchaser could rely or depend on said agent's representations so alleged to have been made regarding said lot of Plat "D" or take his word for the quality or character of the soil or its adaptability for orchard purposes, or that the same were true.

V.

These defendants deny that they or any of them ever at any time or place made any of the representations or statements referred to in paragraph V of the first alleged cause of suit set out in said bill of complaint and aver that they and each of them are without knowledge as to whether or not any of said alleged representations or statements were made by the said T. W. Kendall, or by any agent or sales manager or other person whomsoever, and deny that said T. W. Kendall ever was at any time or place the agent or representative of those defendant or any of them; and these defendants aver that they, and each of them are without knowledge as to whether or not any alleged representations or statements referred to in said paragraph V were known to be false by any person whatsoever or were made with intent to deceive or defraud this plaintiff, by inducing her to enter into such alleged contract of purchase, or made with intent to deceive the plaintiff at all; and these defendants aver that they and each of them are without any knowledge as to whether or not the plain-

tiff believed the said alleged statements and representations to be true or relying or acting on said alleged representations or statements, or reposing special or any trust or confidence in said alleged agent or representatives making same, entered into said alleged contract of purchase of Lot 18 of Plat "D" aforesaid or paid thereon said cash payment of seven hundred dollars (\$700) or as to whether or not plaintiff would not have entered into said contract of purchase or made said payment thereon had she known said representations or statements to be false.

VI.

Admits that the plaintiff has paid to the said W. C. Harding Land Company on account of the purchase of lot 18 of Plat "D" of Roseburg Home Orchard Tracts, the sums set out in paragraph VI of the first alleged cause of suit in said bill of complaint, but denies that any greater sum than four hundred and twenty eight dollars 59/100 (\$428.59) thereof was ever paid to these defendants or any of them, which sum of \$428.59 these defendants received from said W. C. Harding Land Company as part of the purchase price of said lot, these defendants being owners of said lot.

VII.

These defendants deny that said lot 18 of Plat "D" is not worth to exceed fifty dollars (\$50) per acre or that its use or value exists only for ordinary farm purposes when drained by tiling; or that it lies very low

or is bottom land, or in a swale, or that during high water in the rainy season or at any time the nearby creek or any creek overflows or sweeps over any part of the said lot or that the water stands on said lot during the winter months or at any time or does not drain away; deny that the subsoil of said lot is a sort of joint clay or very tough or tough at all, or of the nature of "hard pan," so that the water does not soak or drain through the said subsoil; deny that the said soil is not adapted for orchard purposes or is entirely or at all unfit for the growing or production of apples or peaches; or that during the summer or dry season said soil dries out or bakes or becomes very hard or cracks, unless cultivation thereof be neglected; deny that when said soil is plowed it turns up in great chunks or clods or is almost or at all impossible of cultivation; deny that the particular qualities, character or location of said lot make it utterly or at all worthless for orchard purposes or to the growing or culture of apple or peach trees or to maintain same.

VIII.

Deny that for the purpose of further or at all persuading or inducing plaintiff to purchase said lot 18 of Plat "D" or to make said cash payment of \$700 or other or subsequent payments thereon, or for any purpose or at all these defendants or any of them by an agent or officer or representative or directly or indirectly in any manner falsely or at all stated or represented to the plaintiff that if plaintiff would enter into said agreement or purchase said lot 18 of Plat "D" or

make said payments therefor, that they or any of them would plant said tract to Spitzenberg or Newtown Pippin or other apple trees, with peach tree or other fills, or give thorough or any cultivation or care to same in every or any detail necessary to the proper or other growing of said trees for the period of three years or any period whatsoever, or during said or any time to replace any trees that should from any cause die or become injured, or that they or any of them would deliver to this plaintiff a full or any set or thoroughly or otherwise cultivated or any planting, and these defendants deny that said alleged statements or representations or promises were false or fraudulent or that these defendants or any of them at any time knew that the same or any part thereof were false, and deny that the same were made to mislead or deceive plaintiff, or that plaintiff relied upon same as true or acted thereon to her damage at all.

IX.

These defendants aver that they and each of them are without knowledge as to whether or not on or about the day of July, 1913, plaintiff made a journey to Oregon or to said Douglas County, and these defendants deny that at said time the plaintiff for the first time discovered or learned that the said alleged representations regarding said lot 18 of Plat "D" were false or untrue, and deny that plaintiff discovered said representations to be false or untrue at all, or that thereupon plaintiff notified these defendants or any of them that further payments would not be made on said contract

on account of said alleged fraud, or immediately or at all sought restitution by demanding of these defendants or any of them the return of said purchase money, or of any payments made on said alleged contract or because of it, or that plaintiff at any time tendered back to these defendants or any of them said contract of purchase or offered to surrender up or cancel the same, or that plaintiff was then or ever since has been or now is, ready or willing or able to do that which in equity or good conscience she should do in reference to said agreement or said lot or that plaintiff elected to rescind or cancel the said agreement, and deny that plaintiffs had any agreement with these defendants or any of them and deny that plaintiff elected or offered to quitclaim or re-convey by sufficient or any deed or otherwise any or all title or estate in said lot by said plaintiff to these defendants or any of them; deny that these defendants or any of them ever gave to plaintiff any assurance or had with plaintiff any understanding that anything whatever would be done by these defendants by way of any alleged amends or alleged restitution in respect to said purchase or sale; deny that plaintiff has sustained damage by any action of these defendants or any of them in any sum whatsoever.

And for answer to the further and second alleged cause of suit set forth in said bill of complaint the said defendants specifically deny the allegations set forth in the same, except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters.

And for answer to the further and third alleged cause of suit set forth in said bill of complaint the said defendants specifically deny the allegations of the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters.

And further answering said bill of complaint these defendants allege that at all times mentioned in said bill these defendants were and now are the owners of the real property described in said bill, namely: Lots numbered 17, 18, and 19 in Plat "D" of Roseburg Home Orchard Tracts in Douglas County, Oregon, as shown by the recorded Plat thereof, being portions of a larger tract of land owned by these defendants and platted by their trustee for sale; that the W. C. Harding Land Company is and was at all times herein mentioned a corporation, incorporated, organized and existing under the laws of the State of Oregon, having its principal office at Roseburg, in Douglas County, Oregon, and engaged in the business of buying lands, planting the same to fruit trees and then selling the same.

That on or about July 1st, 1909, the defendants, J. T. Epperly, James P. Burns, Walter Adair, F. S. Green, and one C. H. Carney, who afterwards disposed of his interest to the defendant, L. B. Wallace, were the owners of a certain tract of land situated in Douglas County, Oregon, a part of which was afterwards platted by the trustees of the defendants herein as Plat "D" of Roseburg Home Orchard Tracts referred to in the bill of complaint; that said owners being desirous of selling and disposing of said land, and the said defendant

W. C. Harding Land Company having represented to defendants that it could find purchasers for those portions of said lands which were suitable for orchard purposes, provided same were sub-divided into small tracts, the said owners on the one part and the said W. C. Harding Land Company on the other part entered into a written agreement bearing date July 1st, 1909, by the terms of which the said W. C. Harding Land Company was to take charge of said lands and find purchasers therefor, during a period of one year from said date, according to the terms and conditions of said agreement, a copy of which agreement constitutes a part of Exhibit "A" attached to plaintiff's bill of complaint herein; that by a subsequent agreement made between these defendants and the said W. C. Harding Land Company bearing date September 10, 1910, a copy of which subsequent agreement is also embodied in said Exhibit "A," said agreement of July 1st, 1909, was modified, and by said agreements defendants were to have \$200.00 per acre for their said lands; that subsequent to said July 1st, 1909, said W. C. Harding Land Company caused such portions of said land as were suitable for orchard purposes to be surveyed and platted as said Plat "D" of Roseburg Home Orchard Tracts, and placed the same on the market in its own name as though it were owner thereof and entered into contracts with various persons for the sale of portions of said platted land, including the purchasers mentioned in the said bill of complaint; that in advertising said lands and in selling the same the said W. C. Harding Land Company never at any time held itself out as the agent

of these defendants or any of them, but at all times dealt with said lands as though it was the owner thereof; and the said W. C. Harding Land Company entered into written contracts with the respective purchasers of said land, including all of the purchasers mentioned in the bill of complaint herein, in its own name, none of these defendants as owners of said lands being in any way mentioned or referred to in said contracts or known in any way to any of said purchasers; that for the purpose of disposing of said lands the said W. C. Harding Land Company, upon its own account and for itself alone, undertook and agreed with the respective purchasers thereof, including the purchasers mentioned in the bill of complaint herein, that it would plant said lands to fruit trees of certain agreed varieties and cultivate and care for the trees on each lot for three years, and said W. C. Harding Land Company in making sales of said lots demanded and received, because of said planting and cultivation and in payment of its commissions and expenses, a price per acre over and above the \$200 per acre which these defendants as the owners of said lots were to receive; that it was at all times expressly understood and agreed by and between the W. C. Harding Land Company, and these defendants that these defendants should have no interest in any of said contracts for the planting or cultivation or care of fruit trees on said tracts, but all such contracts were to be made by said W. C. Harding Land Company on its own responsibility and none of these defendants were to be in any way responsible or liable for carrying out the same or to derive any benefit therefrom, or

incur any liability thereunder; and the said W. C. Harding Land Company made all such contracts for planting, cultivation and care in its own name and upon its own responsibility, and, as these defendants are informed and believe, and therefore allege, never claimed or represented that it was acting as agent for these defendants or any person or persons whomsoever; that all promises and agreements made to each and all of the purchasers mentioned in the bill of complaint herein with reference to planting, cultivation and care of said lands were made by said W. C. Harding Land Company in its own name and for itself alone and not as representative of these defendants or any of them or of any other person or persons; that each and all of the purchasers mentioned in the bill of complaint herein at all times well knew that under said contracts they were to look to the said W. C. Harding Land Company, and to it alone, for the performance of all of said contracts, and none of said purchasers ever at any time looked to these defendants or any of them to perform any undertaking in said contracts; that it was at all times contrary to the intention or expectation of these defendants, as the said W. C. Harding Land Company at all times well knew, that any such contracts for planting, cultivation or care of fruit trees should be embraced in contracts for the sale of said land, notwithstanding which said W. C. Harding Land Company included its agreements with purchasers with reference to planting, cultivation and care of fruit trees on said lands in the same agreements which covered the sale of the lands, the said W. C. Harding Land Company at all times

contracting and acting with reference to said lands toward all purchasers as though it were the absolute owner of said lands and the only person interested therein.

That none of these defendants ever at any time had anything to do with the sale of said lands; that all sales were negotiated by the said W. C. Harding Land Company and its agents and all representations, statements and promises with reference thereto which were made *were made* by said Company and its agents as coming solely from said W. C. Harding Land Company, and none of the purchasers mentioned in the bill of complaint herein were ever led to believe that said W. C. Harding Land Company was acting therein as agent for these defendants or any person or persons whomsoever.

That each of the said tracts of land referred to in the bill of complaint herein, is and was at all times a tract of fertile orchard land, well adapted to the successful growing of fruit trees, and at the time of entering into said contracts of sale with each of the purchasers mentioned in the bill of complaint herein, or as soon thereafter as practicable, the said W. C. Harding Land Company, as required by its contracts with said respective purchasers, planted said lands to Spitzenberg and Newtown Pippin apple trees, with peach tree fills as required by contract, and did thereafter for three years cultivate and care for each of said tracts as required by the terms of the contracts of said Company, with the respective purchasers, and at the expiration of said three years of cultivation and care there was on each of said tracts a thriving and growing young orchard

of Spitzenberg and Newtown Pippin apple trees; that the peach trees planted on said tracts as "fills" were intended to grow on said lands only temporarily, the intention being to remove same when the growth of the apple trees should require the whole of the soil, but it was found by experience that while the peach trees grew, they did not thrive so well on said soil as did the apple trees, and afterwards by agreement with the said respective purchasers named in the bill of complaint and long prior to July, 1913, the said W. C. Harding Land Company removed said peach trees from said tracts of land and with the express consent and agreement of said respective purchasers replaced said peach trees with pear trees which pear trees have ever since grown and flourishd upon said premises.

That each of said lots of land referred to in the bill of complaint is of rich and fertile soil and suitable for growing apple and pear trees; that after the close of the three years period of cultivation by the said W. C. Harding Land Company the said purchasers each neglected to properly cultivate or care for the said respective orchard tracts, but notwithstanding such neglect and want of care on the part of said purchasers and the plaintiff herein, the orchards on said lots of land are still living and growing and with proper care can readily be put into first-class condition as young orchards; that each of said lots is of a character of soil practically the same as various tracts of land in said county and in the same vicinity upon which fruit trees are being successfully cultivated and maintained at the present time; that practically all of the apple and pear

trees planted on said lots have grown and developed in a satisfactory manner except a small percentage of loss of trees not exceeding the percentage of loss ordinarily incurred in the development of a young orchard on the best of soil; that said land needed some drainage and the said W. C. Harding Land Company caused the same to be drained by ditching, in the manner in common use in said county; that the surface soil is a black soil slightly sticky in character but highly productive and capable of successful cultivation with ordinary care, and said surface soil extends to a depth of more than two feet, and no joint-clay or "hard pan" has been discovered underlying same; that the neglect of the said lots by the said purchasers after the said W. C. Harding Land Company had fully performed its contract for three years cultivation in each case, has been the sole cause of any unsatisfactory appearance of the soil of said lots.

That the price at which said W. C. Harding Land Company contracted to sell said lots to the purchasers named in the bill, namely \$350.00 per acre, including planting and three years' cultivation and care, was reasonable and not exorbitant; that said land alone was reasonably worth \$200.00 per acre; that since said sales were made the market value of fruit lands and orchards in said county has somewhat decreased, and the industry of fruit growing has suffered a backset, and the effort of the purchasers named in the bill to rescind said contracts and recover moneys alleged to have been paid is an inequitable attempt to avoid the natural though perhaps temporary loss which they appear to have suf-

ferred by the decline in land values and the stagnation of the fruit-growing business.

For a second and separate answer and defense to said bill of complaint and the whole thereof these defendants allege that they are informed and believe and therefore allege that long prior to July, 1913, each of the said purchasers mentioned in the said bill of complaint learned and fully knew of the exact location, quality and character of the soil of said respective lots of land and of the quality and kind of trees planted thereon by the said W. C. Harding Land Company and of the nature of the care and cultivation given to said lots by the said W. C. Harding Land Company and of the fact that peach trees had not grown so successfully upon said lots as all the parties interested had expected, and that each of said purchasers namely Mrs. Glenn D. Hart, Glenn D. Hart and Ella Peterson agreed with the said W. C. Harding Land Company that if said Company would take out said peach trees and replace the same with pear trees, which had been found by experience to grow more successfully than peach trees upon such soil, that each of them would accept the same as full satisfaction of any loss or damage suffered by the failure of peach trees to flourish in said soil; that in all other respects said purchasers were satisfied with the said lots and the orchards thereon and accepted the same as according to their respective contracts of purchase with the said W. C. Harding Land Company; that thereupon and in reliance upon said arrangement and understanding with each of said purchasers the said W. C. Harding Land Company at its own expense,

removed said peach trees from said tracts of land and planted instead thereof pear trees and said pear trees have ever since continued to grow and flourish thereon; that the said Glenn D. Hart, one of the said purchasers, and husband of Mrs. Glenn D. Hart plaintiff herein, prior to July, 1913, became a stockholder in the said W. C. Harding Land Company and a salesagent for said company, selling lands in said Plat "D" of Roseburg Home Orchard Tracts and as such stockholder and salesagent the said Glenn D. Hart was, long prior to July, 1913, thoroughly familiar, by actual inspection, with each of the said lots of land mentioned in the bill of complaint, including the character of the soil thereof, the kind and character of the trees planted thereon, the cultivation and care thereof, and all other facts with reference to the condition and value of said lots and each of them, and that the said Mrs. Glenn D. Hart at the same time had like knowledge with reference to said lots, and neither said Glenn D. Hart or said Mrs. Glenn D. Hart repudiated or attempted to repudiate or rescind or cancel the said contracts of purchase of the lots sold to them by said W. C. Harding Land Company, but that on the contrary, and prior to July, 1913, approved and ratified said contracts, while in full possession of all the facts involved; and these defendants allege that for the reasons just stated neither of said respective purchasers nor the plaintiff herein ought now to be admitted to allege that they or any of them have been damaged by the alleged failure of said peach trees to grow or by any alleged defects in fruit trees, or by reason of the said soil being, as alleged, unfit for the

growing of fruit trees or being in any way deficient or contrary to the representations of said W. C. Harding Land Company at the time of said respective sales, or at any time.

WHEREFORE, these defendants having fully answered, pray that this suit be dismissed, that they go hence without day, and recover their costs and disbursements herein.

B. L. EDDY,
Attorney for Defendants
Adair, Epperly, Burns,
Green and Wallace.

AND AFTERWARDS, to-wit, on the 18th day of May, 1914, there was duly filed in said Court and Cause an answer (agreed statement thereof) in words and figures as follows, to-wit:

Comes now W. C. Harding Land Company for itself alone and makes answer to the bill of complaint herein as follows, to-wit:

Answering plaintiff's first cause of suit:

I.

Denies that on or about the 21st day of March, 1910, or prior to the making of the alleged agreement between this answering defendant and the plaintiff Mrs. Glenn D. Hart by or through the representatives of this answering defendant or its agent or sales manager T.

W. Kendall, or by or through any person whomsoever, at Deadwood, South Dakota, or at any place for the purpose of inducing plaintiffs to purchase said lot 18 in Plat "D" or otherwise or at all, or to induce her, the said Mrs. Glenn D. Hart, to make her first payment on said purchase price falsely or fraudulently stated or represented to plaintiff that said tract of land comprising ten acres and designated as lot 18 in Plat "D" was worth the sum of thirty-five hundred dollars (\$3500) or that the three tracts then remaining unsold, namely, lots 17, 18 and 19 of said Plat "D" were the choicest tracts of the entire plat, or that this answering defendant or any one of it or in its behalf falsely or fraudulently stated or represented that any examination or report showed the soil in any of said lots to be particularly adapted to the growing of apples or peaches, or that said tract of land had the best soil of that section of the Umpqua Valley for that purpose, or as good as the volcanic ash soil of the Wenatchee district of Washington, or that the soil of said tract was a deep rich loam or easily cultivated, or that the tract was a sort of upland or had perfect drainage or that this answering defendant or any of its agents ever misrepresented in any particular by views, blue prints, booklets, plats, maps or otherwise to any of the plaintiffs or either of them, the condition of said land or the soil thereof, and allege the fact to be that the said tract of land is a rich soil well adapted to the growing of apples.

II.

Denies that this answering defendant or any one in its behalf or in its name authorized so to do ever stated or represented that it was not necessary to make a trip to Oregon to look over or examine said lots of Plat "D" or that it was entirely safe to buy it relying solely upon the statements of this answering defendant, or those made by the alleged agent of said defendant, or that the plaintiffs, or either of them, could rely or depend upon said agent's representations, or to take his word for the quality or character of the soil, for its adaptability for orchard purposes, but alleges the fact to be that this answering defendant through all of its officers and agents at all times at great expense of time and money displayed the land offered by it for sale and at all times urged all prospective purchasers to visit and carefully examine the land before purchasing it;

Denies that this answering defendant or any one in its behalf by its authority or the said T. W. Kendall, ever made any statements or representations that were false or fraudulent or any such representations or statements which were known to be false to any of the defendants herein, or were made with intent to deceive or defraud the plaintiffs or either of them, or for the purpose of inducing her to enter into said alleged contract of purchase.

III.

Denies that the plaintiff Mrs. Glenn D. Hart reposed any special trust or confidence in this answering

defendant or its alleged agent T. W. Kendall or other representatives; Denies that any of the defendants, and particularly this answering defendant ever intentionally or purposely either by its officers, agents or any of its representatives ever at any time made any false representations or statements to the plaintiffs or either of them.

IV.

Denies that said Lot 18 of Plat "D" is now worth to exceed fifty dollars (\$50) per acre or is worthless when planted to apples and cultivated for three years as provided in said contract, than the sum of three hundred and fifty dollars (\$350) per acre, or that its use or value exists only for ordinary farming purposes when drained by tiling, or that it lies very low or is bottom land or in a swale or that during high water in the rainy season or at all the nearby creek overflows or sweeps over part of said lot or that the water stands on it during the winter months, or does not drain away, or that the subsoil is a sort of joint clay, very tough or of the nature of "hard pan"; Denies that the soil of *set* lot is not adapted for orchard purposes or is entirely or at all unfit for the growing or production of apples; or that during the summer or dry season said soil dries out, bakes or becomes very hard or cracks unless the cultivation thereof is thoroughly neglected or that when plowed it turns up in great chunks or clods, or is almost impossible of cultivation, or that it is even difficult of cultivation, or that its particular quality character or location make it worthless or in any degree for orchard

purposes or to the growing or culture of apple trees or to maintain the same; and alleges the fact to be that said soil is of a deep rich fertile nature and when properly cultivated, very productive of practically all kinds of vegetables, cereals and fruits grown in the Umpqua Valley.

V.

This answering defendant further alleges in explanation that unknown to it at the time the sale was made to the plaintiff, said land is not particularly well adapted to the growing of peaches, but is well adapted to the growing of apples and pears and produces such fruit in great abundance and of the choicest quality. That it is not true that said land is utterly worthless for orchard purposes or to the growing or culture of apples or peach trees or to maintain the same, although said land is not as well adapted to the growing of peaches as some other land in the same vicinity, or as to the growing of apples and pears and other fruits.

VI.

This answering defendant denies that for the purpose of persuading or inducing plaintiffs or either of them, to purchase said lot 18 of Plat "D" aforesaid or other land or to make such cash payment or other or subsequent payments thereon, the defendant, by its agents or officers or representatives or at all, falsely stated or misrepresented to the plaintiffs, or either of them, that if plaintiff would enter into said agreement or purchase lot 18 of Plat "D" or make said payments therefor, that

the defendants would plant said tract to Spitzenberg or Newtown Pippin apple trees, the peach tree fills not less than forty six to the acre, or give thorough cultivation or care to the same in every detail necessary to the proper growing of said trees for a period of three years, or during said time to replace any trees that should from any cause die or become injured, or that they would deliver to this plaintiff a full set thoroughly cultivated or planted as alleged, or that all or any of said statements or representations or promises were false or fraudulent, or that the defendants knew said statements or representations or promises were made to mislead or deceive the plaintiff, or that plaintiff was damaged as set out in plaintiff's complaint by any of said statements, representations or promises as alleged in her complaint or otherwise or at all.

VII.

This answering defendant alleges the fact to be that this answering defendant did plant said tract in all respects as it promised to do and did carefully and in a good horticultural and husbandlike manner cultivate and care for said tract after the same had been so planted for the full period of three years.

That if said tract is not now in good condition or was not in good condition at the time the complaint of plaintiff was filed in this suit, that such lack of good condition is due to the negligence of the plaintiff since the period of three years during which this answering defendant was to care for the same had fully expired.

VIII.

Denies that the plaintiff on the day of July, 1913, or at any time discovered or learned that the alleged misrepresentations regarding said lot 18 of plat "D" were false or untrue, or that the said representations were false or untrue, or thereupon or at all notified defendant that further payments would not be made upon said contract on account of said alleged fraud.

IX.

Denies that the plaintiff is now ready or willing to do that which in equity or good conscience she should do in reference to the said agreement on said lot.

X.

Denies that this answering defendant or any of the defendants ever gave any assuance or gave to the plaintiff any reason for understanding that something would be done by the defendants towards rescinding the contract referred to in plaintiff's complaint.

XI.

Denies that the plaintiff has sustained damage by said alleged acts of the defendants in the sum of one thousand four hundred and sixty-seven and 48/100 (\$1467.48) dollars or in any sum whatever, either with or without interest.

Further answering plaintiff's said first cause of suit, this answering defendant alleges that the peach trees

planted upon said tracts of land were so planted there for temporary purposes only, and were not intended either by the plaintiff or this answering defendant as a permanent improvement of the tract of land described above.

That as soon as this answering defendant ascertained that the peach trees so planted did not flourish as this answering defendant believed that they would, it did everything in its power to fully perform and comply with the exact terms of its contract with the plaintiff, and did offer thereafter to substitute pear trees as such fillers for the peach trees for the reason that it was known that said soil and climate was especially adapted to the growing of pears.

That since the expiration of this answering defendant's contract with the plaintiff to cultivate and care for said orchard planted on said tract the plaintiff has utterly and wholly neglected to properly cultivate and attend to said land and said orchard thereon, and by reason of such neglect and want of care on behalf of the plaintiff the said orchard is not in as good condition as it would have been had proper attention and care been given it by the plaintiff.

That at the expiration of this answering defendant's contract for the care and cultivation of said tract of land and the orchard thereon, the same was in good first class condition, and in all respects as represented by this answering defendant except possibly that the peach trees remaining thereon were not as vigorous or as healthy as it was hoped they would be.

And answering plaintiff's second cause of suit this defendant specifically denies the allegations set forth in the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters, and pleads affirmative matters substantially as in answer to first cause of suit.

And answering plaintiff's third cause of suit this defendant specifically denies the allegations set forth in the same except the making of said contract of sale and the payments made thereon, the ownership of the land and some other formal matters, and pleads affirmative matters substantially as in answer to first cause of suit.

WHEREFORE this answering defendant having fully answered the bill of complaint of the plaintiffs prays that this suit be dismissed and that it go hence without day and recover its costs and disbursements herein from the plaintiffs.

O. P. COSHOW,
Attorney for Defendant W
C. Harding Land Com
pany.

AND AFTERWARDS, to-wit, on Tuesday, September 30, 1914, the same being the 75th judicial day of the regular July, 1914, term of the United States District Court for the District of Oregon—Present the Honorable R. S. Bean, United States District Judge, presiding—the following proceedings were had in said cause, to-wit:

Plaintiff's Counsel: We desire to introduce in evidence, at this time, the following document, which has been marked for identification Plaintiff's Exhibit "C," this exhibit is introduced in evidence by stipulation and agreement between counsel for plaintiffs and defendants without objection.

The same was so received and is (per agreement) as follows:

(See blue print on opposite page.)

(Testimony of L. J. Chapin)

And thereupon witnesses on behalf of plaintiffs and defendants, after being duly sworn, testified as follows:

L. J. CHAPIN

A witness on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

My official title is county agriculturist for Marion County, which position I have held since September 1, 1912.

My duties are to assist the farmers in increasing their incomes, raising their standard of farming, improving their agricultural conditions and includes any phase of agriculture.

I have never taken horticulture as a special phase. I graduated from Washington State College in 1911. I left college and took the position as Agronomist at the Western Washington Experiment Station; served there until I took this position.

I took at college the course classified as the Agronomy course, which includes the study of soil and crops.

Orchards and orchard lands come under my observation as all other crops do. I think that has had as much attention as the other lines of agricultural work.

Mr. Rader, the county agriculturist for Lane County, and I were on a trip to Southern Oregon. We stopped off at Wilbur at Mr. McCroskey's request, and examined the Roseburg Home Orchard Tracts, or Plat D. Mr. Crosky had a plat. Plaintiff's Exhibit C is

(Testimony of L. J. Chapin)

the plat that I had at the time of my visit there and I used this in locating these tracts. I was on 17, 18 and 19 of these tracts. I was asked to examine the physical condition of the soil and I did so. I classified that soil as a clay soil; a very fine clay soil ordinarily spoken of as an adobe soil, properly classified, I presume as a playa clay soil. Playa is a beach or level plane. It is a Spanish word, referring to low lands; it is used as a classification of very fine clay soil, probably more popularly known as adobe soil. It is called in that vicinity I think—I was talking with a man just over the fence from where we stopped at the man's farm—he called that adobe soil.

We dug into Lot 17 four or five holes to a depth of about 18 inches, or more. The difference between this soil and what was found on the surface was that it was a sub-soil. The sub-soil is somewhat finer clay, tending towards a blue color; very fine clay, apparently almost impervious to water, judging from the condition we found the land in. That is, it is capable of preventing water from soaking through it. The moisture, of course, under those conditions has to pass off by evaporation, and it leaves the surface very hard. Salts are all deposited at the surface and the soil is rendered very hard at the surface, under such conditions. There is also a tendency to crack; it always cracks under such conditions. This explains very well the physical condition of the soil I think.

We took samples from each of the holes we dug; I think it was taken for the purpose of examination.

(Testimony of L. J. Chapin)

We walked over all three of them and examined them carefully.

As to what this land is adapted for, I could judge only from the vegetation that was growing there. The grasses, the rye grasses and various other grasses that are especially adapted to wetter lands, were in evidence. If I were asked to recommend a crop for it, I would say it would be adapted to growing such grasses as English, and Italian Rye Grass, Red Top and other grasses that are adapted to wetter lands and heavy wet soils. The fact that it is not drained, of course, and is very wet near the surface, is evidence that it is not fit for the growing of any kind of fruit trees, in its present condition. It would be possible to put it into a condition by artificial drainage. By this I have in mind subsurface or underground drainage—tile drainage. If I may explain the difference between that and surface drainage, I would say that surface drainage under such conditions does not drain the subsurface. Because the sides become cemented over, a surface drain ditch is almost entirely useless as a means of releasing subsurface water, so all such tracts, would require tile drainage.

So this soil, in its present natural condition, is not adapted for the growing of apple trees.

I was there about June 16th, 1915; at that time there was no surface water on these tracts; the surface was very hard. I recall seeing some trees in a very unthrifty condition; not making a very good growth, because if I may judge from the looks of the ground,

(Testimony of L. J. Chapin)

they hadn't been cultivated for some time. That land is very difficult to cultivate under its present condition because the moisture doesn't leave the ground early enough in the year to cultivate it properly and when it does leave it goes out through the surface instead of being under-drained, and leaves the ground very hard, so it is difficult to plow at any time. I don't think it had been cultivated last year, if I may judge from the vegetation and grass, but wouldn't swear to that of course.

I noticed a number of dead peach trees but do not recall whether I saw any dead apple trees. The ground there is naturally very level, but I take it from the ridges and ditches that the parties cultivating it had endeavored to surface drain it. It had been plowed to the trees for a number of years, I should think from the looks, and the tree rows were ridged up and between the spaces were very deep dead furrows. There was just one creek on it, I think across the east end of it—towards the railroad anyway; there was another small creek toward the mountain side, there was along the mountain side parallel to the road, a low lying tract having water courses in it, I think might possibly be termed a swale, but not in these particular tracts.

I saw no rushes or sedge growing on these tracts, to my knowledge or remembrance; there was a ditch running through these tracts, which was dry at that time. We took a soil sample from the bottom, possibly two feet down. I could not tell what the effect of a ditch of that kind would be in the rainy season there or whether

(Testimony of L. J. Chapin)

it could accommodate the water that would gather from the hillside. It wouldn't matter from the physical condition of the soil whether it did or not because the sub-soil condition was such that the surface drainage wouldn't make much difference to it.

By physical examination, I mean the taking of the soil and looking at it, with a glass, examining it with the hands and with the eye. If the vegetation is yellow, and shows an unthrifty condition, it is due to what might be termed nitrogen starvation; that might be due to the fact that the soil is too wet; it might be due to the fact that there is not sufficient organic matter to produce the necessary nitrogen; the evidence would be shown by the condition of the vegetation.

In the event that trees could be grown there, it would probably effect only the size of the fruit; if the tree is in unthrifty condition, it would limit the yield and size of the fruit only; the trees themselves would grow very slowly; be what might be termed a stunted condition. This would be caused by lack of ability to secure an abundance of plant food. I might explain that nitrogen—nitrification, requires three important conditions. First, it must have heat, and second moisture, and third, oxygen. Too much moisture in the soil prevents the action; it needs an amount of all of these—a proper amount of all of these elements. Too much moisture prevents the nitrification, cools the land, and thereby retards plant growth.

(Testimony of L. J. Chapin)

CROSS EXAMINATION.

I presume that I visit as many orchards as I do any other crop in my work now, but I didn't specially prepare myself for what is termed horticulture.

REDIRECT EXAMINATION.

In my observation of these three tracts the soil in all three seemed very similar. As to its value for any purpose, it is suited only to grasses, the growing of grasses that are adapted to wetter lands. Its value in money could only be judged from the crops that could be grown. Its value, purely from an agricultural standpoint, what one could get in return from his investment, I would say is worth probably \$50.00 per acre in its natural condition. I base that answer on an examination of about 529 farms in Marion County. We made, that is the Government, made a soil survey, or farm survey in Marion, Polk and Yamhill Counties. We found that after deducting the running expenses, all expenses of farming, charging up 5% interest on the investment that a large percentage of the farms have nothing to credit to what was termed the labor income of the farmer.

RE CROSS EXAMINATION.

I do not know anything about what the market value of that land may have been in 1910.

(Testimony of H. M. Kimball.)

H. M. KIMBALL

A witness on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION.

I live in Portland and am a practicing attorney. I am acquainted with Mr. Harding. I don't remember where I first did meet him.

I have been in Roseburg, and met Mr. Harding there, also Mr. Lundburg. We all went out to several tracts there, but I can't recall them by letter. We went with him to the tracts in which Mr. Lundburg was interested at that time, which was the fore part of June, 1913.

I knew at that time what tracts Mr. Lundburg was interested in; it was the Peterson tract, and the two Hart tracts which I had pointed out to me by Mr. Harding. The Peterson tract evidently had been recently plowed, or cultivated at the time we were there. It was reasonably level and the ground, evidently in plowing, had come up in rather hard chunks, and looked rather hard, and I should say, baked.

I went over the tracts with Mr. Lundburg at that time, assisting him in taking pictures and afterward marking the films that we took in the kodak, as to what tracts they were taken on.

Plaintiff's exhibit D-1 was taken on one of the Hart tracts; I think on the middle one; D-2 is also taken on one of the Hart tracts—the one nearest the road that

(Testimony of H. M. Kimball.)

we came in on. We walked through this tract, and the grass was very dense in there—grown high—I should say nearly to the waist in parts, and the ground in parts, was more or less wet; so much so that we got our feet wet and pretty muddy. Many of the trees were missing; that is, they evidently had been set one time, but there were many missing, and those that were there didn't appear to me to be in a healthy condition; those missing had evidently died and not been replaced; some of the old stubs were still there.

Plaintiff's exhibit D-4 was also taken, I believe, on the middle Hart tract. There had been a little plowing done, or cultivating, between the rows or along them, slightly, but it was mostly grown up to grass, but not as high as on one of the other tracts. The leaves of the trees that were growing, especially the peach trees, were curly and yellow.

I could not give a definite idea as to the number of apple trees dead or missing, but I would think about a quarter, either dead or missing in the two Hart tracts, possibly more.

Plaintiff's exhibit D-5 is a picture taken on the Peterson tract, which had been recently cultivated; the picture in the foreground is my own.

Plaintiff's exhibit D-6 was taken on the Peterson tract near one of the edges of the tract, as I recall. I should think the ground covered by this picture would be two or three acres in extent. The major part of that was uncleared; there were some rocks and a lot

(Testimony of H. M. Kimball.)

of stumps and snags. I do not know the kind of rock, but it was a heavy rock that seemed to be imbedded in the soil more or less. I should say, it was a boulder.

Plaintiff's exhibit D-7 was taken on the Peterson tract.

On all of these pictures, excepting D-6 the surfact looks bumpy and broken, which as I remember it are clods of earth that as it was plowed up did not pulverize fine; there were more or less small stones on it; this was true of all the Peterson tract that had been plowed.

Plaintiff's exhibit D-8 was taken on the Peterson tract from about the same point of the picture where I appeared, but in a different direction.

EXAMINATION BY THE COURT.

I think those pictures would go well together. The one I am in would be about a half of the Peterson tract, and the other would be about a half; might not include quite that much.

DIRECT EXAMINATION CONTINUED.

On the Peterson tract, it seemed to me there were a great many more trees missing than on the other tract, although that may have been because it showed up plainer, the ground having been cultivated, but in all of the tracts there were more or less trees missing.

In explanation as to the condition of these two Hart tracts, Mr. Harding said that if we had only come a

(Testimony of H. M. Kimball.)

few days later they would have been in better condition; that is, he would have had them cultivated. He also said he had been disappointed in the cultivation of all three of the tracts; that they had been sadly neglected. I don't recall when he said the Peterson tract had been plowed; my memory is that it had been plowed shortly before we were there. He said this tract had caused him more trouble than all the other tracts and that it was a mistake to set it to orchard.

THE COURT: You spoke about the land being wet, about getting your feet muddy in walking over it. Was that due to the natural location, or to recent rains? These pictures indicate that there was more or less slope from the hillside.

WITNESS: The tracts, as I remember them, were almost level; there was a slight slope to them, but were almost level. I don't think there had been a recent rain anywhere near at the time we were there, but I think it was rather water, or moisture, that had remained in the ground.

Pictures offered in evidence and marked Plaintiffs Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, and D-8.

PLAINTIFFS COUNSEL: If the Court please, we desire at this time to introduce in evidence on behalf of the plaintiff the following documents which have been marked for identification Plaintiff's Exhibits A, B, E, F, and G, and we desire the record to show that these Exhibits are offered and received in evidence by

stipulation and agreement between counsel for plaintiffs and defendants, without objection. The same were so received and are in substance (agreed statement thereof) as follows:

Plaintiff's Exhibit "A":

(This is the contract between the owners of Plat D and the W. C. Harding Land Company and is the same contract referred to as Exhibit "A" in plaintiff's bill of complaint.)

"THIS AGREEMENT made and entered into this 10th day of September, 1910, by and between Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, parties of the first part, and the W. C. Harding Land Company, an incorporation incorporated, organized and existing under the laws of the State of Oregon, and having its principal office and place of business at Roseburg, Oregon, party of the second part, WITNESSETH: WHEREAS the said J. T. Epperly, James P. Burns, Walter Adair, F. S. Green and one C. H. Carney, to whose interest the said L. B. Wallace has since succeeded, did on the first day of July, 1909, enter into a certain written agreement, of which the following is a copy, to-wit:

'Memorandum of agreement made and entered into this first day of July, 1909, by and between S. H. Carney, J. T. Epperly, James P. Burns and Walter Adair and F. S. Green, hereinafter known as parties of the first part and W. C. Harding Land Co. party of the second part.

Witnesseth: That Whereas parties of the first part have, or are about to purchase the ranch near Wilber, Oregon, known as the Rice & Rice Ranch, or the Jack Chenoweth ranch, consisting of four hundred and sixty one acres, more or less and hereby enters into the following arrangements with party of the second part for the subdivision and sale of said property, upon the following terms to-wit:

First: Party of the second part shall have entire management of the sale of said tracts for the period of one year from date, provided they use all diligence and made every effort to *consummate* the sale of said property, after it is subdivided into its several tracts. But it is expressly understood that the party of the second part shall have negotiated at least Sixty Thousand Dollars worth of bona fide sales upon said property, within the above specified time, or forfeit any equity they may have in this contract, other than the commissions herein-after agreed upon.

It is furthermore understood and agreed that the minimum price per acre to be charged purchasers for this property shall be Two Hundred Dollars, barring exceptions that both parties to this contract shall agree to in writing.

It is furthermore agreed that as fast as the land sales are consummated that the first Thirteen Thousand and Sixty One Dollars of contracts shall be placed in escrow at the Douglas National Bank in favor of Napoleon Rice and associates, from whom the deed to this

property comes. That the next Ten Thousand Dollars of Contracts shall be and become the property of the first parties to this agreement and the balance of the contracts and property shall be equally divided between the first and second parties to this agreement.

It is furthermore agreed that all the cash taken in from the sales of the above mentioned tracts, except what is allowed party of the second part to this agreement, for the exploitation and sale of the land, shall be and become the property of the first parties to this agreement, and as fast as it is so paid to the parties of the first part they shall give due credit against the Ten Thousand Dollars of contracts above mentioned. It being the intent of this agreement that the first parties to this agreement shall receive a total of Ten Thousand Dollars in cash and contracts for the cash they advance to purchase the property.

It is further agreed that said second party to this agreement shall immediately proceed to have this entire tract of land surveyed and subdivided into forty, or more, tracts; that they will get the land into proper shape to exploit and sell within thirty days from the date of this agreement and proceed with all due diligence in the sale of the tracts.

It is furthermore understood and agreed that the party of the second part shall bear all expense whatsoever nature attending upon the sale of this entire tract, and shall be allowed the following commissions for so doing, which they will be allowed to deduct from the

first cash received, namely, seventeen and one-half per cent.

It is furthermore agreed that the selling price of this land proper shall be Two Hundred Dollars per acre, and that the party of the first part shall not be held responsible in any way for the planting contract and care of the trees that party of the second part makes with possible investors; nor shall the party of the first part benefit from the added price that will be put onto the land for such planting and care.

It is furthermore understood and agreed that the above tracts are to be sold under the name of the W. C. Harding Land Company, and the proper officers of the same are to sign the contracts, but deeds are only to be given by parties of the first part or their Trustee.

In witness whereof said parties have hereunto set their hands and seals the day and year above mentioned.

(Duly signed, sealed and witnessed by the parties thereto.)

AND WHEREAS under and by virtue of said agreement, the said W. C. Harding Land Company has platted about Three Hundred and fifty-five (355) acres of said land, being the whole thereof except what is known as the hill land, and said plat is known as Plat "D" Roseburg Home Orchard Tracts; and WHEREAS the said W. C. Harding Land Company has negotiated the sale of various lots or parcels of said lands as platted and has entered into contracts with various purchasers, as shown by the following list:

(In the original contract then follows a list of twenty-five purchasers of tracts in Plat "D," Roseburg Home Orchard Tracts, to whom contracts were issued prior to September 6, 1910, among which Glenn D. Hart and Mrs. Glenn D. Hart are shown as purchasers of Lots 19 and 18 respectively, and the list shows contracts issued wherein the aggregate price of the land sold is \$72,614.50.)

AND WHEREAS the said W. C. Harding Land Company is making said contracts with said purchasers, included and embodied in one contract an agreement for the sale of the land and also an agreement for the planting of the land to trees and the cultivation thereof for a period of three years, AND WHEREAS the said W. C. Harding Land Company, has failed to deposit in the Douglas National Bank, the contracts required by the provisions of said agreement of July 1, 1909, AND WHEREAS it is to the interest of all parties concerned that a new agreement be entered into, modifying said agreement of July 1st, 1909, and also embodying new covenants and conditions which the said parties have mutually accepted.

NOW THEREFORE, it is mutually covenanted, understood and agreed by and between the said parties as follows:

1. In order to secure the payment of the sum of Thirteen Thousand and Sixty-one Dollars which in said former contract was to be covered by a deposit of sale contracts at the Douglas National Bank of Roseburg, Oregon, in favor of Napoleon Rice and associates for

the purpose of liquidating a mortgage held by said persons upon said lands, and also in order to secure to the parties of the first part the payment of said sum of Ten Thousand Dollars which they are to receive from the net proceeds of said lands after the payment of the said Napoleon Rice mortgage, the parties hereto by written agreement with the Douglas National Bank of Roseburg, Oregon, shall at the time of the execution of this agreement, deposit with the said Douglas National Bank, a sufficient number of the sale contracts now in hand and which have been entered into between various purchasers and the said W. C. Harding Land Company, to equal Twenty Three Thousand and Sixty-one Dollars, or more, at the rate of Two Hundred Dollars per acre for the land, it being the intention of the parties hereto that such proportion of sale contracts as shall be applicable to the said planting and cultivation contracts of the W. C. Harding Land Company shall not be counted as a part of said deposit of Twenty Three Thousand and Sixty-one Dollars and the contracts so deposited shall be sufficient in amount to equal Twenty Three Thousand and Sixty-one Dollars, or more, without reckoning the proportion thereof applicable to planting or cultivation, and the segregation of the amounts to be paid on said contracts shall be made on the basis of Two Hundred Dollars per acre for land itself embraced in said contracts. Said party of the second part shall duly assign and transfer said contracts to said parties of the first part and shall include in said assignment a provision to the effect that the said parties of the first part shall not be liable to cultivate and care

for the lands embraced in said contracts or any part thereof, and it is to be at all times understood that the parties of the first part are not to be in any way liable or responsible for the performance of said contracts for planting or cultivation or any part thereof, or for any costs, damages or charges whatsoever in connection therewith. And in consideration of the mutual covenants and agreements of the parties hereto and particularly the extension of time and other concessions granted herein by the parties of the first part, the party of the second part does hereby guarantee full payment and performance of all the stipulations of all of said sale contracts made on said lands described in said agreement of July 1, 1909, on the part of the respective purchasers.

It is understood that the contracts deposited as hereinbefore provided for shall be those selected and approved by the parties of the first part hereto and the terms and conditions of the deposit shall be set out in a tri-partite agreement in writing to be entered into between the parties to this agreement and the said Douglas National Bank, to the effect that said bank shall hold said contracts in trust and the makers of said contracts shall *to* notified to make payments thereon to said bank, to be received and disposed of by it in the following manner, to-wit: Each payment received is to be divided into two parts, one part to bear the same proportion to the payment made that the value of the land embraced in the particular contract at the rate of Two Hundred Dollars per acre, bears to the total purchase price named in said particular contract and this part of said payment is to be applied by said bank first

to the payment to the parties of the first part of the sum of Eight Hundred Dollars and subsequent payments upon the said Rice mortgage as often as such items shall amount to One Thousand Dollars, or such less sum as the holders of said mortgage may be willing to accept and endorse on the promissory note secured thereby; after the security of the said mortgage in full, the same proportion of subsequent payments upon said contracts shall be placed by said bank to the credit of the parties of the first part herein to apply upon said Ten Thousand Dollar payment hereinbefore mentioned and shall be paid to and divided between the parties of the first part by said bank every ninety days, or oftener, and it shall be the duty of said bank to render statements of the conditions of said accounts to the person hereinafter named, who is to act as Trustee of the title to said land. The remaining portion of each payment on said contracts being the proportion thereof applicable to the said planting and cultivation amount, shall be placed by said bank to the credit of the party of the second part herein. After the said Eight Hundred Dollars, the said Rice mortgage and said Ten Thousand Dollars to go to the parties of the first part have been paid out of said deposited contracts, and after the parties of the first part shall have received their interest paid on Twenty Three Thousand and Sixty One Dollars of said sale contracts as contemplated in paragraph No. 5 hereinafter set out, then any balance received on account of said contracts applicable to price of land shall be equally divided, one half to the parties of the first part and one half to the parties of the second part.

But the parties of the first part are not to share in that proportion of any payment on any contract held in trust or in the hands of the party of the second part which is applicable to the planting or cultivation clause in such contract.

2. All sale contracts in hand at the end of ninety days from this date shall be deposited in trust for collection in a bank to be agreed upon by B. L. Eddy for the parties of the first part and the party of the second part under an agreement with the bank selected to credit and divide payments applicable to price of land to be received thereon equally between the two contracting parties herein, making due allowance first for any unpaid commissions on sales due the party of the first part and dividing interest on deferred payments as per paragraph numbered five herein.

3. The party of the second part shall proceed with the sale of the unsold portions of said lands and the selling price of the platted portions shall continue to be Two Hundred Dollars per acre as provided in said former agreement, but the hill land shall be sold at such price as will average at least Fifteen Dollars per acre, and the tract known as lot number Thirty-two, consisting of 2.61 acres, on which there is situated a dwelling house and barn, shall be sold for not less than One Thousand Dollars, and when sold, F. S. Green, who has made repairs to said buildings, shall be reimbursed from the proceeds of sale to the extent of the amount invested by him in said repairs up to this date only, and the commission of the party of the second part on the sale of

said tract shall be computed upon the net amount received from sale after reimbursing said Green for said repairs. It is expressly understood and agreed that no contract of sale covering any portion of said lands hereafter to be made shall give to the purchaser more than five years in which to make full payment and upon every such sale there shall be a cash payment of at least twenty per cent of the purchase price. The party of the second part undertakes and agrees to proceed with all due diligence to sell and dispose of, in accordance with the intent and purpose of this agreement, all of the unsold portion of said lands and its authority to make such sales shall continue for six months from this date, and no longer unless by mutual agreement in writing, and time is hereby expressly made of the essence of this contract. The party of the second part shall give the same attention and effort to selling said tracts as it might give to the sale of any other tracts of land which it may have for sale in said county, and in all respects use its best efforts to promptly dispose of said lands by bona fide sale in accordance with the intent and purpose of this agreement. At the expiration of ninety days from this date, the party of the second part shall render to B. L. Eddy of Roseburg, Oregon, for the use and benefit of the parties of the first part, a full statement as to all sales and other business transacted up to said time by the party of the second part under this agreement, and at the same time surrender any pay over to such bank as said B. L. Eddy may designate, for the use of parties of first part, one half of the money realized up to that date from the sale of said land after deducting

commissions of the party of the second part. At the end of six months from this date, the party of the second part shall again render to B. L. Eddy a like statement and shall make a like payment and the parties hereto will at said time divide between them all sale contracts not already deposited in bank under this agreement and all contracts deposited under paragraph numbered two and all cash and hold their separate shares of the proceeds of this venture, in severalty except as to the deposit of contracts provided for by paragraph numbered one, and at the expiration of said period of six months from this date, the authority of the party of the second part to make sales of said land, shall cease and determine unless extended by mutual agreement in writing, and any unsold parcels of said land shall revert to the parties of the first part free from any control or interest of the party of the second part. In making said agreement and division of contracts and cash, allowance shall be made for said selling commission of the party of the second part and of interest on deferred payments accrued to the parties of the first part.

4. It is understood and agreed that as soon as practicable after the execution of this agreement, the parties of the first part shall convey all of the said lands embraced in said agreement of July 1, 1909, to B. L. Eddy of Roseburg, Oregon, as Trustee to hold the legal title thereof in trust in order that he may execute conveyance to purchasers of parcels of said land when such parcels shall have been paid for in full, and said Trustee shall also be duly authorized to execute and acknowledge and file for record the necessary plat and dedication

thereof at the expense of the party of the second part, including the dedication of roads and ways in order that said lands may be deeded with reference to said plat in compliance with the Statutes of the State of Oregon.

5. It is understood that all deferred payments provided for in contracts for the sale of said lands shall draw interest at six per cent per annum, and that the parties of the first part shall be entitled to such proportion of said interest as the price of the land itself shall bear to the sale price of the various tracts, and the party of the second part shall be entitled to any interest paid upon such proportion of the deferred payments as shall be applicable to its cultivation contracts.

6. It is understood and agreed that as to any sale contracts to be hereafter turned over to the parties of the first part under this agreement, or at any time deposited in escrow hereunder, the party of the second part does hereby not only guarantee full payment of the sums named therein by the respective purchasers under said contracts, but undertakes and agrees that as to every such contract as turned over or deposited, it will also faithfully perform every stipulation on its own part to be performed under the same, including planting and cultivation of the land, and will at all times hold the parties of the first part, and each of them harmless from all costs, charges, expenses, damages and claims of every kind arising on account of any such contract made by the party of the second part with any purchaser for planting or cultivating any of said lands.

7. In construing this agreement it is to be borne in mind at all times with reference to any settlement or division of receipts or profits or sale contracts, that the parties of the first part are not to share in any payments made on account of planting or cultivation of any of said lands, except under sale contracts which have been set over and transferred to them upon a division. To determine what payments are applicable to purchase price of land and what to planting or cultivating where both are united in one contract, regard is to be had to the selling price of the land as fixed by this contract and the proportion said price bears to the price fixed by the party of the second part in the contract with the purchasers.

The terms of the foregoing agreement are modified before signing in the following particulars, to wit: First, it is understood and agreed that the sum of Eight Hundred Dollars to be paid out of the contracts deposited with the Douglas National Bank, as mentioned on page 6 hereof, is to be deducted from the Ten Thousand Dollars payment which goes to the parties of the first part, and wherever the said Ten Thousand Dollars payment is mentioned the same shall read Nine Thousand Two Hundred Dollars; Second, the guaranty entered into by the party of the second part on page 5, is to be modified by adding thereto the following provision, namely: "But as regards the time of performance of said contracts on the part of the said purchasers, substantial compliance with the contracts shall be sufficient."

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this September 10, 1910."

(Duly signed, sealed and witnessed by the parties thereto.)

PLAINTIFF'S EXHIBIT "B":

(Deed from owners of Plat D to B. L. Eddy, Trustee.)

"KNOW ALL MEN BY THESE PRESENTS, That we, Walter Adair and Hattie M. Adair, husband and wife, and Fred S. Green and Era A. Green, husband and wife, and L. B. Wallace and Eula Wallace, husband and wife, and J. T. Epperly, a single man, and James P. Burns and Daisy P. Burns, husband and wife, in consideration of one dollar and other valuable considerations to us in hand paid by B. L. Eddy, Trustee, of Roseburg, Oregon, have bargained and sold and by these presents do grant, bargain, sell and convey unto said B. L. Eddy as Trustee, the following described property, situated in Douglas County, Oregon, to wit:

(In the original deed appears a description of the several tracts or parcels of land, portions of which were platted as Plat D, Roseburg Home Orchard Tracts, the technical description of which is omitted by agreement.)

To have and to hold unto the said B. L. Eddy forever in trust, however, to hold and dispose of the same for the benefit of the grantors herein, with full power and authority in said Trustee to make, execute and

deliver deeds, conveyances, contracts and assurances of title with covenants of warranty, conveying said lands in suitable parcels, when paid for in full, to purchasers thereof through the W. C. Harding Land Company, a corporation, incorporated, organized and existing under the laws of the State of Oregon, and having its principal office at Roseburg, Oregon, in accordance with the terms of a certain agreement in writing providing for the sale of said lands and dated September 10, 1910, and executed on the one part by the grantors herein and on the other part by the said W. C. Harding Land Company. And in case there shall be any residue of said land remaining unsold through or by the said W. C. Harding Land Company under the terms of said agreement of September 10, 1910, and after the termination of the authority of said W. C. Harding Land Company to make sales thereof, such residue of land shall be reconveyed by said Trustee to the grantors herein, or their assigns. And the said Trustee is duly authorized and empowered to make, execute acknowledged and file for record in the office of the County Clerk of Douglas County, Oregon, a plat and dedication of said lands dividing the same into tracts and laying off and designating roadways through the same, and to do whatever may be incidental to the proper platting of said tract, in accordance with the Statutes of the State of Oregon, in that behalf provided.

And We, the grantors above named do covenant to and with the grantees of our said Trustee, said grantees being those hereafter named in deeds to be executed by said Trustee, that the above granted premises are free

from all incumbrances excepting a mortgage for the principal sum of thirteen thousand and sixty one dollars and interest, made in favor of N. Rice and associates and recorded in the Records of Mortgages of Douglas County, Oregon, which mortgage the grantors herein are to pay and discharge as required by its terms; that we will and our heirs executors and administrators shall and will forever warrant and defend the title of the above granted premises and of the respective parcels thereof to be conveyed by our said trustee to the grantors thereof, their heirs and assigns forever.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 12th day of September, A. D. 1910."

(Duly signed, sealed, witnessed and acknowledged by the grantors.)

PLAINTIFF'S EXHIBIT "E":

(Contract of sale of Lot 18, Plat D, W. C. Harding Land Company to Mrs. Glenn D. Hart.)

"THIS AGREEMENT, made and entered into in duplicate this 24th day of March, 1910, between W. C. Harding Land Company, Inc., a corporation, of Roseburg, Douglas County, Oregon, party of the first part, and Mrs. Glenn D. Hart, of the City of Deadwood, South Dakota, party of the second part;

WITNESSETH: That the said party of the first part, in consideration of the covenants and agreements herein contained, agrees to sell unto the party of the

second part, Lot 18, Plat "D" of Roseburg Home Orchard Tracts, Douglas County, State of Oregon, as shown and designated on the duly recorded plat of same, for the sum of Thirty five Thousand Dollars, to be paid with interest at the rate of six per cent per annum on deferred payments, in U. S. Gold Coin in four installments as follows: Seven Hundred Dollars on delivery of this contract, the receipt of which is hereby acknowledged, and Seven hundred Dollars on or before the 24th day of March of each and every year thereafter, interest to be paid annually until the entire sum is paid.

It is further agreed that during illness or the unavoidable loss of employment by the party of the second part, the payment on this contract may be suspended for three months, provided notice in writing has been given to and accepted by the party of the first part, but this privilege cannot be exercised more than once, time being the essence of this contract.

Time is the essence of this agreement, and upon the failure of second party to perform her part of this agreement, or make the payments on the dates hereinbefore stated, or default for sixty days, then and in that event the second party hereby forfeits all rights under this agreement, and all interest in said land; and all payments made hereunder shall be considered as rent for said premises and liquidated damages, and said second party agrees to deliver up the possession of said premises to said first party, and to make no further claim thereto.

The first payment of Seven Hundred Dollars to be paid to any person authorized to deliver this contract, and all installments to be paid to the W. C. Harding Land Company at their office in Portland or Roseburg, Oregon.

And the said party of the second part, in consideration of the premises, covenants and agrees to make the above payments punctually as above specified, and the said party of the first part also agrees that when final payments shall have been received it will cause to be executed and delivered, at its own cost and expense, to the said party of the second part, his or her heirs, executors or assigns, a good and sufficient Warranty Deed free from all incumbrances, to the said property, together with an abstract of title.

And the said party of the first part hereby agrees to plant said tract to APPLES of the same commercial varieties as planted in the entire plat, as follows: Spitzenberg's and Newton Pippins with peach tree fills not less than forty six to the acre. Not less than forty eight apple trees to the acre, and to give thorough cultivation and care to the same, with such pruning, spraying and attention in every detail necessary to the proper growing of said trees for a period of three years, from the date of planting. During said three years said party of the first part is to replace any trees that from any cause should die or become injured to such an extent as to render the same other than commercial trees, meaning and intending thereby that said party of the first part will deliver to the said party of the second part a full set, thoroughly cultivated planting as aforesaid.

And the said party of the second part hereby agrees to pay all taxes and improvements that may hereafter be lawfully imposed upon said property, including that for that year 1910.

IN WITNESS WHEREOF, the said parties have hereunto set their hands the day and year first above written."

(Duly signed, sealed and witnessed by the parties thereto.)

PLAINTIFF'S EXHIBIT "F":

(Agreed statement of contract of sale of Lot 19 Plat D, W. C. Harding Land Company to Glenn D. Hart.)

This contract is dated March 24th, 1910, and in form and substance is the same as Exhibit "E" (the same, printed form being used) and under like terms, except payments, the W. C. Harding Land Company agrees to sell to Glenn D. Hart Lot 19 Plat D, Roseburg Home Orchard Tracts, for the sum of \$3500.00 with interest on deferred payments at the rate of six per cent per annum, \$700.00 on delivery of the contract, the receipt of which is acknowledged, the balance to be paid at the rate of \$900.00 annually thereafter, and said contract is duly signed by the parties thereto.

Glenn D. Hart, under date of April 23, 1912, in writing thereon for a valuable consideration, granted, sold and assigned to Mrs. Glenn D. Hart, plaintiff, all his right, title, interest, claim or demand in and to said

contract which assignment was duly approved in writing thereon by W. C. Harding Land Company and B. L. Eddy, Trustee.

PLAINTIFF'S EXHIBIT "G":

(Agreed statement of contract of sale of Lot 17 Plat D, W. C. Harding Land Company to Mrs. Ella Peterson.)

This contract is dated October 15, 1910, and in form and substance is the same as Exhibit "E" (the same printed form being used) and under like terms, except as to payments, the W. C. Harding Land Company agrees to sell to Mrs. Ella Peterson Lot 17 Plat D, Roseburg Home Orchard Tracts, for the sum of \$3500.00 with interest on deferred payments at the rate of six per cent per annum of which \$100.00 was paid on April 15, 1910; \$300.00 on May 15, 1910; \$400.00 on November 1, 1910; and \$25.00 per month thereafter until the full amount was paid; contract acknowledged the payment of \$400.00 upon delivery and the contract was duly signed by the parties thereto.

Mrs. Ella Peterson on November 15, 1913, in writing thereon for a valuable consideration, granted, sold and assigned to Mrs. Glenn D. Hart, plaintiff, all her right, title, interest, claim or right of action in and to said contract.

It was then stipulated and agreed between counsel for plaintiffs and defendants that the payments on each of the three contracts as set forth in the bill of complaint

(Testimony of Mrs. Glenn D. Hart.)

were made at the times and in the amounts as therein alleged.

MRS. GLENN D. HART.

A witness on behalf of plaintiff, testified as follows:

My name is Mrs. Glenn D. Hart and I reside at Deadwood, South Dakota. Glenn D. Hart is my husband.

I know the defendants Mr. Wallace and Mr. Harding and have known Mr. T. W. Kendall for ten years and have had business dealings with him. He came to my home in Deadwood, South Dakota, in March, 1910, representing the Harding Land Company of Roseburg, Oregon, and told me that this was one of the best land companies in the West. He was talking about Plat D and lot 18 in Plat D. He told me that this was rich sandy loam soil equal to volcanic ash, and was especially adapted to growing apples, and was easily cultivated. I asked him if it would be necessary for me to come to Oregon to look this property over before purchasing, and he said that I could rely on anything the Harding Land Company had to offer for sale as they were perfectly reliable. I had perfect confidence in Mr. Kendall and had always known him to be a man of his word.

He said the land was worth \$350 an acre, and they would plant this to apples and put in peach fillers, and that the Harding Land Company would dispose,—and even their literature,—you will find where they say they

(Testimony of Mrs. Glenn D. Hart.)

will dispose of the peaches after the third year, and you could make the rest of your payments on what you would get for your peaches, for the land. He said this was one of the choicest tracts of land, and that he had saved these tracts especially for his friends. He mentioned three tracts, 17, 18 and 19 in Plat D. He gave me some printed literature and said that I could depend on anything those pamphlets contained and that whatever these pamphlets said they would do.

One of these booklets is a large red apple in booklet form and the other was a long booklet with Roseburg on and the apple on the other side. This pamphlet handed me, marked Plaintiff's exhibit H I saw when Mr. Kendall was in Deadwood selling me this land; this was before I signed this contract. I read it at that time and relied upon the statements therein.

Pamphlet offered in evidence and marked Plaintiff's exhibit H; said pamphlets containing the following statements:

"Umpqua Valley, where the ideal apple has been perfected. W. C. Harding Land Co., Owners and Planters, Roseburg Home Orchard Tracts.

Reasons Why You Should Buy an Orchard Tract in the Umpqua Valley: Umpqua Valley surpasses the world in producing the reddest apple. Umpqua Valley raises the very best keeping apple in the world. Umpqua Valley needs no Irrigation and grows all fruit to perfection. Umpqua Valley is entirely free from late frost that injures fruit. Umpqua Valley has a climate that is unexcelled in all the Northwest. Umpqua Valley is

(Testimony of Mrs. Glenn D. Hart.)

the most picturesque of all the valleys in Oregon. Umpqua Valley has the largest planting of the famous Spitzenberg and Newton Pippin apples in the State of Oregon. Umpqua Valley has pure water, furnished from the beautiful mountain streams, and within easy access through the soil.

Young peach trees (Early Crawfords). We plant peaches between the rows of apple trees, as peaches yield in their third year and never fail in the Umpqua Valley."

When Mr. Kendall was offering this tract of land of the W. C. Harding Land Company to me for sale, he handed me a copy of this pamphlet marked plaintiff's Exhibit I and said it would verify any statement they had to offer for sale of this land. I read that through before I signed the contract and relied upon the statements contained in the same at the time.

Pamphlet marked Plaintiff's Exhibit I offered in evidence; said pamphlet containing the following statements;

"Roseburg Home Orchard Tracts, W. C. Harding Land Co. Owners and Planters. W. C. Harding Land Co. are the pioneers in planting, operating and subdividing large commercial orchards in the Umpqua Valley. During the last two years this company has planted and subdivided over 3000 acres of the choicest fruit lands. Besides this developed acreage, W. C. Harding Land Co. has sold thousands of acres of Umpqua Valley fruit lands to independent orchard planters, individuals and companies who are operating on a large scale, both in pears and apples.

(Testimony of Mrs. Glenn D. Hart.)

W. C. Harding Land Co. is not concerned in the exploitation of any townsite. It has specialized in the planting and dividing of orchards and is the largest exclusive planter of Newtown Pippin and Spitzenberg apple orchards in Oregon."

"The Umpqua Valley: In the production of Newtown Pippin and Spitzenberg apples the Umpqua Valley has stood the test of time. These two varieties were developed to their highest perfection in this valley. For 50 years Umpqua orchardists supplied the markets of California with the apples that sold at almost fabulous prices. With the development of a world market for Oregon apples, the Umpqua Valley was ready, having the large successful bearing orchards yielding the finest and fanciest fruits. This was not an accident. It was because the climate and soil of the Umpqua Valley were so favorable that growers always had found their orchards profitable. Color, keeping quality and flavor are the three great points that secure the highest price for fancy apples, and this is where the Umpqua Valley maintains its prestige. Composition of the soil, protection from frosts, ideal altitude and distribution of rainfall combine to produce in these two fancy varieties a richness of color, spiciness of flavor and soundness of keeping quality nowhere else attained. The shrewd buyers of London and New York pay a premium price for Umpqua Newtowns and Spitzenbergs, contracting for the entire output of large or associated orchards while still on the trees. With the experience of all the Umpqua growers as a guide and inspiration, W. C.

(Testimony of Mrs. Glenn D. Hart.)

Harding Land Co. began the selection of land, purchasing that which was best adapted to their especial purposes and planting it to orchards. There was no need to experiment or take the slightest chance. It was simply a case of following the footsteps of successful growers."

"Disinterested fruit authorities state that the ideal altitude for the production of the fanciest grade of Newtown Pippin and Spitzenberg apples is from 450 to 600 feet above sea level. All of our orchards are at an altitude within this favored zone. As one noted fruit authority said: 'The Umpqua Valley is one of the greatest apple sections of the world; year in and year out its trees yield three apples to one from trees in other celebrated fruit districts.'"

"Earliest of the Early: Eminent authorities at the State Agricultural College pronounce the Umpqua Valley the earliest in Oregon by one or two weeks in maturing berries, small fruits and vegetables for market. No fruit section in Oregon farther south than the Umpqua enjoys so low an altitude, hence none has so early a season. North of the Umpqua, in Oregon and Washington, the season is retarded by the increased moisture. Invariably the Umpqua Valley is the earliest of the early. The confidence prominent orchardists of successful and well known fruit sections of the Northwest have in the Umpqua Valley is abundantly proved by their having invested in our orchard lands and engaged in their development."

"How We Have Planted: On the properties we

(Testimony of Mrs. Glenn D. Hart.)

have divided into small tracts we have planted Yellow Newtown Pippins and Spitzenberg apples, with peaches as fillers between the rows of apple trees. The peach trees stay between the rows until apple trees crowd them out. We planted peaches because in the Umpqua Valley this crop virtually never fails. Peaches begin to yield in three years here, two or three boxes from each tree in the third season, producing so prolifically as to provide an income sufficient for a living and enough in addition to make the payments on the purchase price of the tract. The market for fresh peaches from the Umpqua Valley is unlimited, as no peaches are grown commercially to the North."

"You Can Own a Tract: Our easy payment plan makes it possible for the wage earner or professional man dependent upon a small salary or limited income to continue in his present occupation while acquiring a future home in Roseburg Home Orchard tracts. You can come at any time, establish your home, build your bungalow and cultivate your orchard. If you come prior to the third year, you are sure of an income from raising small fruits, berries, poultry, celery, asparagus, etc. If you come after that, the peach crop provides abundantly both for living expenses and payment on the lands."

"If the owner is not ready to come at the end of three years, W. C. Harding Land Co. will continue to operate the tract at a nominal cost, retaining half of the net proceeds from the crop as its compensation for

(Testimony of Mrs. Glenn D. Hart.)

marketing same, and surrendering to the owner the other half."

"No Experience Necessary: It is not necessary to be a scientific orchardist in order to secure independence and a liberal income from one of our tracts."

"No Irrigation Needed: God irrigates the Umpqua Valley. You do not have to rely upon any artificial rainfall. The advantages are manifold. One of them is that the trees take better root—the roots spread instead of bunching. If the water is brought artificially to the trees, there is no incentive to grow sturdy and hardy roots. With the water distributed naturally by rainfall, the roots spread and go after it, taking a firm hold in the soil and securing strength and moisture at all seasons for tree and fruit."

I saw the land for the first time in July, 1912. In company with Mr. Wallace and Mr. Hart I went out to these tracts of land and instead of finding an orchard I found the weeds higher than the trees, and at least a quarter of the trees dead or missing, and a large part of this land had never even been cultivated. It was all covered with high grass and a swamp; they made excuses as to the land looking so badly on account of not being able to procure help and had had trouble, but would have it attended to. Then Mr. Wallace took us over to Garden Valley. We went over to overlook this Garden Valley and when I returned to Roseburg Mr. Harding told me they would sell these tracts of land and give me some good land in Garden Valley. I had no further conversation with Mr. Harding except that I wouldn't

(Testimony of Mrs. Glenn D. Hart.)

make any more payments until I had something for my money, and I made no payments after that. He said the land had been neglected but they would have it fixed up, cultivated and the weeds taken off.

There weren't very many trees in the low part of the land, and part of it had never been cultivated, and the ground was all dry and hard and cracked. They said they would put pear trees in; they discovered that peach trees wouldn't grow on this soil and they would put in fillers of pear trees on this land, but I didn't tell them to.

There was no comparison between Tract 18 of Plat D and the land I visited in Garden Valley; over in Garden Valley they had trees and we didn't have any; theirs were beautifully cultivated and ours hasn't been cultivated at all. I did nothing further at that time relative to it.

We came out here again in May, 1913, and Mrs. Peterson went down to see the land and came back and told me what condition it was in and said mine was even worse and I went to see an attorney and placed the matter in his hands. My attorney wanted me to meet Mr. Harding in his office to talk with him over this proposition and Mr. Harding refused and wouldn't talk to me about it at all, and then I left it in the hands of my attorney. During the time that I made the first and last trip, Mr. Harding did not make any proposition to me of any kind and I never suggested or said to him that things were satisfactory.

I certainly would not have bought this land and

(Testimony of Glenn D. Hart.)

entered into that contract if I had known these statements made by Mr. Kendall at the time were false. From the time I assumed that land first, I have been ready to do what was equitable in the matter.

CROSS EXAMINATION.

Mr. Hart attended to almost all the business for me; he conducted the correspondence and did nearly all the business between myself and the Harding Land Company.

GLENN D. HART.

A witness called on behalf of the plaintiff, testified as follows:

I am Glenn D. Hart, the husband of plaintiff in this action and purchaser of lot 19 in Plat D, Roseburg Orchard Homes. I am a traveling salesman; for the past ten years I have been selling goods on the road.

I know two of the defendants in this action, Mr. Harding and Mr. Wallace and have had business dealings with them.

Mr. T. W. Kendall, representing the W. C. Harding Land Company of Roseburg, Oregon, came to Deadwood, South Dakota, my home, and said that he was selling Roseburg land for the Harding Land Company; said he had something very choice to offer in Plat D of the Roseburg Home Orchard Tracts. And

(Testimony of Glenn D. Hart.)

he showed me pamphlets and maps and photographs of this land. That he was out selling his friends and he had three choice plats left in this Plat D and he wanted to sell me one. So after showing me these maps and panoramic views and telling me about it, and telling me about the character of the soil which he said was a black sandy loam soil equal to volcanic ash and easily tillable, and was the best thing the Harding Land Company had to offer in their holdings,—relying wholly on what he said and what was in these pretty pamphlets, I purchased a ten acre tract. He said he was selling the land at \$350 per acre. That they had secured the best experts in the State of Oregon to examine this land before they ever put it on the market and that these experts claimed this was the best land in the entire valley for orcharding. He said this was the best tract that the Harding Land Company owned; that it was high valley land and that it did not need draining or irrigating. He said the company was the most reliable in the State of Oregon.

I had known Mr. Kendall for ten years before I signed this contract. I suggested to him that it would be well for me to examine it but he told me it was absolutely unnecessary that the company was reliable and that the deal was all right; that I knew him, and had known him for years, and it was absolutely unnecessary to waste that time and money in coming out to see it.

Before I signed up the contract, he handed me one of the books like plaintiff's exhibit H; I read it through

(Testimony of Glenn D. Hart.)

then and relied upon these statements contained in it, which he said were absolutely true.

I saw plaintiff's exhibit I at the time of the purchase of this land, along about the latter part of March, 1910, and read it through at the time and relied on the statements contained in it. Mr. Kendall said anything contained in pamphlet "I" could be relied on as applying to this land in particular.

I would not have entered into this contract for the purchase of lot 19 if I had not believed the statements as made by Mr. Kendall and as contained in these books.

I saw the land first in July, 1912. I tried to see the land along in January, 1911, but it was covered with snow and I couldn't get down onto it; and again in 1912, in February, I tried to see it again, but it was covered so with water I could not see it, so in July, 1912, in company with Mr. Wallace, then secretary of the Harding Land Company and my wife, we drove out to see this and the minute we got out there Mr. Wallace began to apologize about the condition of the land; said that they had been hard up and couldn't get help to take care of the land, and they couldn't plow it, and made all kind of excuses. I simply found a few trees scattered around over the tract, and a big slough in there, never been cultivated or planted, and the weeds were higher than the trees, and after talking around awhile he said: "Let's forget this; I will take you over to Garden Valley and show you some good land." So he drove over to Garden Valley and showed us around for awhile and then took us to Roseburg to Mr. Harding's office; we

(Testimony of Glenn D. Hart.)

met Mr. Harding there and he said: "I want to apologize to you people for the condition that land is in; God Almighty never intended that land to be planted to orchard; I am going to try to sell that land for you people and locate you over in Garden Valley, give you something good." From that time I made no further payments.

CROSS EXAMINATION.

I was going out to see this land, with a Mr. Jackson; I took a locator and located it all right. Both Mr. Jackson and Mr. Kendall were with me and Mr. Kendall was familiar with the plat and told me in March, 1910, when he was selling me this land that he had visited it several times. We didn't drive any further than to my lot and did not go over 17 or 18 at that time, and did not get out of the buggy that I remember of.

When I first drove to this tract it was covered with snow; that was in January, 1911. The ground did not remain covered with snow during all that time. I didn't go back to see the land after the snow disappeared. The people of the town said it was the biggest snow they ever had down there; it was four inches deep I should judge on my tract of land.

The second time I went to see the land I couldn't tell whether I was dissatisfied or not as I couldn't see enough of it.

I think I entered into business with the Harding Land Company in 1911; I was working for Sleyster &

(Testimony of Glenn D. Hart.)

Kendall in the first place. They were the sales agents for the company; as I remember it, I had a contract in writing with Sleyster & Kendall, and possibly with the Harding Land Company.

The contract you hand me dated March 2, 1911, signed by W. C. Harding Land Company by W. C. Harding, president and by L. B. Wallace, secretary and T. M. Kendall is also signed by Glenn D. Hart, which is my signature. With the exception of the purchase of the lot, I think that is the first business relation I had with the Harding Land Company. Mr. Kendall and I were partners in 1911; as I remember it, the partnership existed for a year. I won't swear that partnership was entered into in 1911; I think I entered into a contract with Mr. Kendall to sell land for the Sleyster & Kendall Company shortly after the time that I bought this tract of land in 1910. I later entered into a partnership with Mr. Kendall himself in 1911; that was after I had tried to see the land.

I don't think I would have seen the land at that time by going back a few days after because the rain in addition, when the snow went away were coming on and you couldn't get to see it.

The letter you hand me dated Deadwood, South Dakota, April 12, 1912, addressed to W. C. Harding Land Company is in my hand writing and has my signature.

Said letter marked Defendant's exhibit A offered in evidence as follows:

(Testimony of Glenn D. Hart.)

“
Deadwood, S. D., 4/12/1912.
W. C. Harding Land Co.,
Roseburg, Oregon
Gentlemen:

Find enclosed check for \$400.00 to apply on the contract of Mrs. Glenn D. Hart in Plat D.

Yours truly,
Mrs. Glenn D. Hart.”

Witness: The letter handed me dated Deadwood, South Dakota, March 8, 1915, addressed to W. C. Harding signed by Glenn D. Hart is my letter and my signature.

Said letter marked Defendant's Exhibit 3 offered in evidence as follows:

“
Deadwood, So. Dak. 3/8/1912.
W. C. Harding,
Roseburg, Oregon
My Dear Sir and Bros.:

Arrived home safely. Had a pleasant trip. Had the pleasure of riding on a fast train. Went by the way of Butte, Montana. Arrived here about the time I expected. Found Mrs. Hart a very sick woman. She is convalescing now, and inside of a week I think she will be so that I can get out and rustle a bit. I hope that Mrs. Harding is better. If I were you when you move to Portland, take the Mrs. along. She will feel better. I certainly enjoyed every minute of your company, and also the rest of the members. The trip was beneficial

(Testimony of Glenn D. Hart.)

to me in more ways than one. I saw the country and when it was looking fine, and I can talk it all the more. Expect a big business here for a few months. Royse is going after them to beat the cars, and I expect that he will sell a great many before the year is out. He wants an office, and his letter to you will explain everything. It is really necessary that he have one, on account of all of his competitors doing business through their office. After I sell one more tract in H, I advise your giving Royse the exclusive sale on Plat H. Kendall and I can sell in Plat C and Garden Valley and then we can sell your twenty acres near Esterbrooks. Write me often. Best wishes to Wallace and all,

Fraternally, Glenn D. Hart."

Witness: At that time I was second vice president of the Harding Land Company and owned some stock for a while and was a member of the board of directors.

The letter handed me dated April 22, 1912, is my letter and signature.

Said letter marked Defendant's exhibit 8, offered in evidence as follows:

“ Deadwood, So. Dak. 4/22/1912.

W. C. Harding,

Portland, Oregon.

My Dear Sir:

Your interesting letter reached me today. Glad to hear from you. Sorry to hear of Kendall's quitting, but it is all for the best, as he has always been more or less discontented. I want this salesmanagership alone.

(Testimony of Glenn D. Hart.)

and never again do I want a partner, so fix things up for me. I am going out with a determination of doing a big business. I have had the toughest luck since I arrived home. My wife's health has been so bum that I have been unable to work; in fact, she is in bed now. We cannot get anyone to run the news stand and we cannot sell it, so we are up against it in bad shape. I have moved to the hotel now and it will be more pleasant for my wife and easier on her. I am going to get out tomorrow and see a bunch of fellows. Expect to sell some of them this week. Would like to come out to Portland and help you in the office, but I believe you can handle it alright, and I can do more good here. What did Kendall and Wallace fight about, I want to keep Royse just where he is, working for me, then I can get along with him, but if he had the same authority as I we could not live with him. You are right about watching him. He wants more things and attention than anyone I ever saw, and he can sell the stuff alright, but I have got to hold him down. You know that I am capable of being salesmanager and I need the money. I am going to work harder now, because I make 15% before I only made 7½%; had to split it with K. Guess he will settle with me, though.

Write me often and keep me posted. Buy our furniture and credit me up. If I were you I would hire Kendall to put real estate deals over in Portland for you. I think he might work for you because he likes you. Best wishes, I am fraternally,

Glenn D. Hart."

(Testimony of Glenn D. Hart.)

and return to me my notes, I can do something, but I cannot work as I should with that debt hanging over me. I am worried so that I cannot get down to real business. I done good before I became associated with the Company, but have never done well since. If I can be just a common hireling I can do good. Never was any good working for myself, so send along those notes to the First National Bank here and I will return over the stock.

Yours fraternally, Glenn D. Hart."

The letter handed me dated March 20, 1913, is mine and has my signature attached.

Said letter marked Defendant's exhibit 15, and offered in evidence as follows:

Deadwood, S. D., 3/20/1913.

W. C. Harding,

Roseburg, Oregon

My dear Sir:

Walter White of Chadron, Nebraska, is here today and he wants to know all about his orchard. Did the last freeze hurt his trees? How many trees will you have to replace for him? How much of a growth have the trees made since setting out? Is the land in good shape? Have the Kleist Brothers looked after them in good shape the past two years? He wrote you some time ago, but you failed to answer him. I wish you would write him at his home, which is Chadron, Nebraska, and give him all of the news about his land and

(Testimony of Glenn D. Hart.)

the country. Also tell me how Mrs. Hart's lot is in the Glenn D. Hart tract. I am still figuring that I can sell some of your tracts this coming summer. I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years.

How about the weather out there now? Have you had much winter? Is the land selling much now? Give me all the news. Give me up and I may be able to go out and sell ten acres.

Give my best wishes to your wife. Remember me to Mr. Hinckley. Write a long letter.

Your friend, Glenn D. Hart."

I wouldn't swear as to whether the letter dated November 6, 1912, defendant's exhibit 19, was written before or after Mrs. Hart and I inspected the land. I can't remember whether we were there before the 27th of July, or the day of the week that we were there.

Letter marked Defendant's exhibit 20, offered in evidence, without objection, as follows:

Deadwood, S. D. 11/6/12.

Mr. L. B. Wallace,

Roseburg, Oregon

My Dear Sir:

I am thinking seriously of caring for my wife's tracts in Plat D this coming year myself. I have a certain knowledge of how to look after an orchard, so will try my hand at it. Very much obliged for the interest you

(Testimony of Glenn D. Hart.)

have shown in the matter. Hoping to see you soon,
I am

Sincerely, Glenn D. Hart."

I purchased the stock I held in the Harding Land Co. sometime in 1911 I believe, from W. C. Harding and gave my notes in payment. I imagine I held it for about a year. I gave it back to him and he returned my notes. The amount was \$5,000.00.

REDIRECT EXAMINATION.

I have no knowledge of agriculture; I never spent any time on a farm and do not know anything about the different varieties of soil. All my experience was knowledge gained through my connection with the Harding Land Company in this matter.

The money used in the purchase of this tract belonged to my wife and the payments made afterwards were made with her money and that is an explanation of my signing this contract over to her.

At the time I visited the tract in 1912 with Mrs. Hart and Mr. Wallace I looked at the soil but didn't know anything about it or whether it was adapted to fruit. I have no knowledge which would lead me to a conclusion as to whether any soil was adapted to any particular purpose, so it was necessary for me to rely upon the statements made by Mr. Kendall. I first learned about the falsity of these statements after my wife had turned the proposition over to her attorneys

(Testimony of Glenn D. Hart.)

and they had made an investigation and reported, in May, 1913; down to then I believed that this land was as represented.

In explanation of my letter Defendant's exhibit 20, regarding my caring for my wife's tract in plat D, I wish to state that after having talked with Mr. Harding and Mr. Wallace relative to this land in July, 1912, when I was there and they told me that they were short of money, and couldn't care for the thing properly, I figured out that if I could have someone care for this and get it in proper shape, as I could see it wasn't in very good shape at that time, we might be able in the course of the next year to sell it and get Mrs. Hart's money out of it. Besides I still owed Mr. Harding \$5,000 for the stock and large commissions coming, and that explains it.

I did not sell any of this Plat D during any of the time that I was connected with the Harding Land Company.

I also entered into a contract for another tract of land located in the Glenn D. Hart tract, which is now transferred to my wife, and she still owns it. I never had any complaint or fault to find with that tract.

At the time I was connected with the company I received letters from them relative to my buying some of the stock of the company. I am familiar with the signature of Mr. W. C. Harding.

Letter received in evidence without objection, marked as Plaintiff's Exhibit J, as follows:

(Testimony of Glenn D. Hart.)

(Letter not dated.)

“My Dear Glenn D.:

How the H—— are you anyway. I have been in Portland for ten days so possibly there is a letter from you to me in Roseburg. Will go down tonight and see. Now, I wrote you in my previous letters *get in the game*. Things are all right with us, but we need the business and are depending upon you for it. I have a \$5,000 block of Harding Land Company stock for you and if you want it send me your note, due in a year at 7% and I will transfer the stock on the books and send it to you. Expect to close with my Portland people to-day for \$12,500.00 which is everything that can, by any possible means, be had. I promised you \$5,000 and want you to have it. Wallace tells me the book value of it is nearly, if not quite, \$7,500.00. These Portland people am taking on are worth \$600,000, so we are tying up with a good bunch. Have some sales staked out that will make us a big bunch of money this year, but of that more anon. Upon receipt of this wire me at my expense at Roseburg. I may come east to help you boys out and especially so if you bring a bunch west; in that event if can get away will go back with you. Shall order 2,000 new folders to you by freight; they will start at once.

Very truly yours,

W. C. Harding.”

(Testimony of Mrs. Ella Peterson.)

MRS. ELLA PETERSON,

A witness on behalf of the plaintiff, testified as follows:

I reside in Colorado. I am assignor of the contract for the purchase of lot 17, in Plat D, Roseburg Home Orchard Tracts. I know the defendants in this—that is, Mr. Harding, and I met Mr. Hinkley when I was down there. He was secretary at the time I saw the land.

When I entered into the purchase of this lot 17 I had negotiations with Mr. Kendall; preceding the time I signed the contract he gave me some literature that was sent out by the company and told me they were one of the strongest and most reliable companies in the State of Oregon and were recognized as such. I read the books he gave me.

Plaintiff's Exhibit H which you hand me is either the same book or one of them.

Plaintiff's Exhibit I is another one of the books. At the time these books were given me I read them and relied on the statements set out therein. This was all previous to my signing this contract. Mr. Kendall referred to the contents of these books applying to tract 17 and told me that the company was perfectly reliable; that they wouldn't dare, under the laws of the state to go out and publish literature that wasn't facts, and

(Testimony of Mrs. Ella Peterson.)

he verified all his statements by referring to these books, or nearly all of them. His statements were an inducement for me to sign this contract. He also said the land was a high priced proposition; that the company had taken pains to select choicest orchard land, and every acre, before placed on the market was examined by an expert and proved to be first class orchard land.

Q. Did he put money value in regard to it?

A. Yes, \$350.00.

He said the soil was rich black loam, easily irrigated, or easily cultivated and never needed draining or irrigating. It was high valley land. He said it was pronounced the finest soil for fruit land and equal to the volcanic ash of Washington and was particularly adapted to apples and peaches.

He gave me, or showed me, a blue print of the different plats on this tract. I told him it was quite a little money to invest and not be quite sure what it was. He told me I could rely upon the company being one of the oldest and most reliable companies in the state, also referring to the literature; and I had every reason to believe the company was all right.

I had known Mr. Kndall for at least ten years; I had every confidence in him. I would not have entered into this contract and paid this money had I believed that the statements made regarding this land were untrue.

I first saw the land in the latter part of May, 1913. I went to Roseburg for the purpose of seeing it, with Mr. Hinkley, then secretary, and Mr. Peterson, my

(Testimony of Mrs. Ella Peterson.)

husband. When we stopped in front of the tract that Mr. Hinkley said was mine, of course I was very much disappointed, and it took him some time to convince me that that was the tract that really the company had set aside for me, because I didn't recognize it as an orchard. It hadn't been properly kept, and hadn't been properly cleared. There were two large pieces, one in the center of the tract and one at one side, that hadn't been cleared, and one corner of the tract was taken off by a large creek. It had been plowed but not taken care of any further; looked as though it had just been plowed and planted; a few trees, I wouldn't recognize as trees, little twigs stuck in the ground is what I would call them. I think some of them were alive.

Mr. Hinkley and I talked about it at the time. We joked about it at first calling it an orchard tract and he was a little *but* confused and made all sorts of excuses about the condition we found it in; he said he was very sorry it had been neglected and that he would take it up with the company when he went back and see that it was taken care of. He took us back to Roseburg to the office and Mr. Harding was there. I didn't talk with Mr. Harding myself, although I was present when he talked with Mr. Peterson.

Mr. Peterson and he talked about the land. Mr. Harding said he knew it was in very bad condition and should have been taken care of, made all sorts of excuses why it hadn't been cared for and the condition the trees were in, etc. He said that he personally would look after it, and felt that he ought to, and that they

(Testimony of Mrs. Ella Peterson.)

had found that peach trees wouldn't do well on this land, and he was in doubt whether apple trees would, but he would replace all the dead trees, both apple and peaches, with pears, and if he discovered later apple trees didn't do well, those would be planted to pears. I didn't care to talk to him at the time for I wasn't in the mood, after seeing the tract, for I didn't consider it an orchard tract.

I made my last payment the first of May before going down. I was out on a vacation with Mr. Peterson and I wanted to settle all matters with the company during our vacation, and I paid up two months in advance, May and June.

The following day, after coming to Portland, I went and saw Mr. Lundburg, an attorney, and told him what I found, and I wanted him to see the company and talk to them and see how the matter could be adjusted.

CROSS EXAMINATION.

I purchased my land in April, 1910. It was planted the next fall. I saw rocks all over the tract; I thought they were pretty thick for a first class orchard tract, to be properly taken care of and some of them were pretty good size—as big as my head and larger. I couldn't say whether they were smooth rocks, waterwashed rock, or whether they were igneous rocks, found in the hills.

Mr. Peterson was given a letter by Mr. Harding saying he would replace the dead trees in pear trees, which I gave to my attorney.

(Testimony of Mrs. Ella Peterson.)

Letter identified by witness, offered in evidence without objection, marked defendant's exhibit 28, as follows:

Portland, Oregon, May 26, 1913.

"Mrs. F. E. Peterson,

Spokane, Washington.

Dear Madam:

In accordance with the conversation with you today regarding your orchard tract No. 17 in Plat D Roseburg Home Orchard Tracts, situated near Wilbur, Ore., we beg to state that during the planting season of 1913 and 1914 we will remove from said tract the peach trees, now on the same, planted as fillers in the rows between the apple trees, and in lieu thereof we will plant pear trees, half Bartlets and half de Anjou; such pear trees to be planted in the center of the squares formed by the apple trees.

All such trees are to be of first class stock and to be planted in good workmanlike manner.

We will also remove the two or three clumps of stumps now in the orchard, and plant the ground now occupied by the same with apple and pear trees as needed. All apple trees that may be dead at that time are to be replaced, according to the terms of the contract.

Yours very truly,

W. C. Harding Land Co.

W. C. Harding, Pres."

I indicated to Mr. Harding that that would not be satisfactory. I was to continue my payments on it

(Testimony of F. W. Rader.)

and I told him I didn't see any inducement to continue my payments on that land. I told him that before that letter was given. He didn't give me the letter. The letter was given to Mr. Peterson; I took it the following day and consulted my attorney and gave him the letter.

I think Mr. Harding was convinced at the time Mr. Peterson was talking to him that I was not satisfied. My attorneys saw him a few days after I consulted them. I saw my attorney and said I was then ready to talk to Mr. Harding, but he refused to talk to me.

F. W. RADER,

A Witness on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

I have resided in Eugene since the first of February of this year. I am agriculturist for Lane County and doing extension work for the agricultural college and the government. As agriculturist we are handling all farm problems and are assigned to special territory; for instance, to a county. We spend the bigger part of our time on the farm, with the farmers, answering requests as they come in; any agricultural problem that they may have.

I have had this position over two years. Before then I was agriculturist at the State Training School farm at Chehalis, Washington, for three years. Pre-

(Testimony of F. W. Rader.)

vious to that I was agronomist at the Western Washington Experiment Station at Puyallup for nearly a year; previous to that I was a student at the Washington State College where I completed a four year course, graduating in 1908. I have been on a farm all my life, you might say; was born and raised there, and spent my vacations on the farm during my college course.

At college I majored in Animal Husbandry, taking agriculture, soils, horticulture, and different things that went with it. Agronomy is the study of crops, especially cereal crops, grasses and also includes soils. While I was at the State Training School at Chehalis, I had direct charge of everything in connection with agriculture there; we put out an orchard of several acres which I personally superintended the planting of, and cared for, for nearly three years. I have had no practical experience in the matter of fruit orchards other than that.

About the middle of June, 1914, I made a visit to an orchard tract located near Wilbur in Douglas County, at the request of Mr. McCroskey, in company with Mr. Chapin, county agriculturist of Marion County. Our main purpose on this trip was a trip south to investigate lime quarries, and at Mr. McCroskey's request, we made the date coincide so I could stop off and look at the tract of land there to see whether or not the soil was suited for orchard purposes.

I think the plat handed me, plaintiff's exhibit 6, is the same plat I have seen before. We examined

(Testimony of F. W. Rader.)

tracts 19, 18 and 17 in this plat and found a very poorly kept orchard, or supposed to be an orchard on those lots. As we entered, if I remember my direction, it was on the west. Plat No. 19 next the road, 18 and 17 in the distance. The first thing I noticed was a lot of swamp grass farmers call rush, on plat 19, about three feet high. Wire grass is the common name of it. This land had evidently been plowed too dry to take the water off of it; had been plowed throwing the dirt up to the trees, leavy very deep dead furrows in the center between these rows of trees. The ground looked as though it hadn't been plowed or cared for for a couple of years and was covered with weeds; evidently plowed wet; few trees on real high spots; number of trees apparently dead. The ground seemed to be poorer over in 17 than the one next the road. 19 and 17 lay a little bit higher than 18; I wouldn't think there would be very much fall to the land. This would have quite an effect on the under drainage as well as the surface drainage. In surface drainage it would help get rid of the excess flow of water, so the water wouldn't back up and stand on it. Under drainage would have more chance to allow air to get in and open up the ground underneath so the soil would open up to a greater depth.

On the surface, I noticed a little difference where the land had been thrown up next to threes apparently putting what humus there was in the soil up on the ridges, showing the natural humus there was very shallow—that is the humus plant food, available plant food,

(Testimony of F. W. Rader.)

such as manure would be, rotted in the soil grass roots and things of that sort.

I would call this soil a very fine clay; it is generally termed by most people, adobe; some call it gumbo. Clay is one of the finest particles of soil. Generally we divide soil into gravel, sand, silt and clay; clay being the finest, void of humus, void of silt or sand. Then we have adobe soil of a plastic nature, like gumbo, and this soil, apparently the deeper you go, you go from what little humus there is on top down to adobe, going on down into gumbo.

This is a piece of land I would never pick out for an orchard. The soil is not deep enough; there is not enough available plant food there for the tree roots to go down and feed upon; there are tree roots feeding through these small hairs, fibres on the roots, and generally a tree will go down sufficiently, if the soil is so it can, until it will root good and deep. This land being very shallow, you naturally would not pick it out for an orchard.

A. No sir, I mean by shallow the available soil—soil that has available plant food in it.

In order for bacteria to live to make plant food available it must have air; also must be warmth and moisture. And you take a fine soil like that the air is practically shut out, and therefore, there is no plant food made available at this depth. No bacteria would live down in that soil to break up the particles that are dead there and make it available; therefore, your roots wouldn't live in that kind of soil.

(Testimony of F. W. Rader.)

You generally find a crop that is adapted to wet land; shallow root species, such as rye grasses, red top, and often find the Alsace Clover will grow on these shallow, wet lands.

From my examination of the soil I would say that it was not capable of absorbing moisture or draining the lands from the surface. The water that would fall on there in the natural course of rain would escape by surface drainage and flow off the top.

This soil is not capable of easy cultivation because of its fine nature. Those particles are so fine if you work it when it is wet, it will puddle; makes it like cement; also being so fine that way, when it dries it shrinks, and therefore bakes. In dry season it would be cracked open. When we were there, we didn't as I remember find any indication of it cracking, because the ground had been left in the rough from the plowing sometime previous.

I made no chemical analysis of the soil, but a physical analysis. Physical analysis is an examination with the eye or hand. You will note by feeling it in the fingers whether or not it is a sandy nature, or fine clay nature.

I wouldn't take that soil to be adapted to any fruits on account of the trees not being able to reach deep enough, and would consider it very poor orchard land.

I have had considerable experience in determining the value of this Willamette Valley land. The government conducts what they call a farm survey in which we take records of a farm actually what that farm pro-

(Testimony of F. W. Rader.)

duces in every phase of agriculture that is carried on in that particular place, finding out exactly what that place has produced, allowing a man a minimum rate of interest on the money invested, and thereby getting what his labor income is, and in that way we can tell just about what the land is producing and the value that should be placed on it. I have had experience along this line and from this experience I wouldn't place the value of that land over \$50 per acre. I base my conclusion upon the number of records that we have taken and that I have helped take of different crops grown on them and what this land would be adapted to.

(In taking these records we consulted with the farmers. The bigger percent of the farmers will tell you that the land prices are so high that they are unable to make ends meet, charging interest on that value. The bigger percent of the farmers as a rule, do not keep tract of their expenses in book form, but they have a very accurate record in mind on most all of these different projects carried on, on the farm.

CROSS EXAMINATION.

Q. You didn't take into consideration at all, what the market value of that and other lands similar to it was, at the time it was sold in 1910, did you?

A. I don't know anything about the prices.

We had a shovel and mattock and examined the soil to a depth of about two and a half feet on all three plots. We made two on 17, two on 18 and one on 19, as I

(Testimony of F. W. Rader.)

remember it. I took it to Eugene. I didn't make a chemical analysis of it. The only examination I gave it was the naked eye and touch.

This soil would not be easily drained by surface drainage, because that type will cement and sort of run together and will only take up top water. An open drainage ditch in a year or two will cement together and practically no water at all will come in through the sides of the ditch.

As I remember it there were two open ditches that went through this tract which I would take to be artificial; they drained a small area. With the ditches that I saw there, it would take quite a long time to wash so as to be deepened by the elements in the natural course of events in that country. Those ditches would cement and the water would run along without having any appreciable effect.

We spent close to an hour on all three of the tracts.

Italian and English Rye, Red Top in particular would grow there. Grain would grow there, but I wouldn't take it to be the best land for that at all.

I didn't see any rocks on no. 17 that I recall. On 17 I went, I presume, about half way to the south and then to the north side of the plat. If rocks had been scattered thickly all over that tract, I think I would have noticed it.

I am familiar with the growth of orchard trees and could tell from inspection what the growth had been for that particular season. At the season that I visited this tract—June, 1914, as I remember it, the trees ought

(Testimony of F. W. Rader.)

to have made considerable growth at that time. The fact is they had made a very small growth. The ground looked like it had been plowed possibly two years ago. It didn't look like it had been cultivated this spring at all. That would make a little bit of difference in the growth of the trees, but not much on that type of ground. Ordinarily trees would not grow just as well without being cultivated.

I noticed a tract of land planted to orchard, apples and other trees, northerly from those tracts, just across the twenty foot road. It was in very good condition. I didn't make an examination of the soil in the other plats across the road. As far as I know the soil was just the same as the soil I examined. The trees looked very good and that land was cultivated.

RE DIRECT EXAMINATION.

With reference to the tract that was north, it was higher than the one I examined. This may have had a great deal of effect on the growth of it; the soil may be a great deal deeper there. Any one who is familiar with the soils in the Willamette Valley, or the Western Coast here, would know that the soils are very streaked. One area may be good, and just within a few yards will find the soil very poor, entirely different.

Q. Then as a rule, if the land is a little higher, or something that way, the land is more liable to be better quality than that which is lower?

A. Not apt to be deeper.

(Testimony of F. W. Rader.)

It would have quite a difference in drainage, in opening up the land underneath in allowing the air to go through.

This land would be greatly benefited by tiling after a number of years, if it were properly put in. It should be put down from three to four feet. I do not know just what your outlet is at this particular tract.

By tiling the land it would be improved mainly in aerating it out; making it so the soil would hold moisture; so it would also let the excess moisture out of it. Making the land frame up and deepen it so you would have plant food at a greater depth.

EXAMINATION BY THE COURT.

I noticed the trees on this plat and they were in very poor condition. As I remember the growth was not half what it should have been. The pear trees as fillers in part of it as I remember were dying. The peach tree fillers that were in plat 17 I believe were very scrubby. I noticed a number of dead trees on the plat but didn't count them.

To neglect the cultivation of a young orchard for the first two or three years would have considerable effect on it ordinarily; it would stunt the growth for one thing and it would be hard to bring the trees out again, so it is important to have a young orchard cultivated, for the first two or three years. As a rule we consider it best to take a tree out and throw it away if it has been neglected and start over again as it is hard to restore them again.

(Testimony of T. E. McCroskey.)

T. E. McCROSKEY

Called on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

I reside at Eugene and am a general real estate broker. For the past twelve years I have been engaged in the sale and purchase of lands and during that time have had considerable experience in planting and caring for orchards. For five or six years I was in the employ of the Lower Yakima Irrigation Company and I had charge of their sales office in the home office, and the field men, and under my supervision came the planting and care of the orchards in that district, a district embracing sixteen thousand acres of irrigated land. I had the supervision of the planting of orchards there.

During the last year, I made a trip to Douglas County at the suggestion of Mr. Lundburg for the purpose of examining an orchard tract located near Wilbur. I made the first trip on May 20, 1914, with Mr. Lundburg, to examine Plat D of Roseburg Home Orchard Tracts and had with me a map or plat. One June 16, 1914, Mr. Rader, county agriculturist for Lane County, Mr. Chapin, county agriculturist for Marion County, and myself made the trip again.

The first trip was to inspect the condition of the three particular tracts there, 17, 18, and 19. We had the plat with us at the time.

On both trips we examined lots designated as 17, 18 and 19 to determine the condition of the soil and

(Testimony of T. E. McCroskey.)

the general condition. On the first trip we made Mr. Lundburg informed me as to which tracts we were on, and then we asked a man by the name of Green who lives near Wilbur in the same general plat, and he verified Mr. Lundburg's statements as to what the tracts were.

The soil conditions there are very close texture clay. It was uncultivated and quite rough. It had been plowed towards the tree rows.

My purpose in making the second trip was primarily to show Mr. Rader and Mr. Chapin the tracts, at the request of Mr. Lundburg. We entered the general plat from the main roadway on the west of the plat and went directly to plat 17; that tract seems to have been cultivated since the other two tracts inasmuch as the vegetation is not so heavy on it and showed a state of cultivation later than the other tracts; but we made two examinations of the soil on tract 17 and found it heavy clay soil. On one examination we dug possibly eighteen inches, or two feet and the other place we went down about two and a half feet. Between 17 and 18, as nearly as I remember there is a waterway—I don't know whether artificial or not—and along that is growing ash brush from eight to ten feet high across the tract. Then there is another waterway on tract 19, beginning with this north line and running practically two thirds of the way across the tract. Evidently on account of the contour of the tract the ditch is discontinued there, and the water has flattened out and stood there. That is where there is possibly three quarters to an acre of swamp

(Testimony of T. E. McCroskey.)

grass, or wire grass. The vegetation, or the grass and the weeds on all the tract for that matter, was in bad condition and showed a poor state of cultivation. The trees on the tract, of course were not in good shape.

On tracts 18 and 19 we found apple trees set with pear fillers, and both the apples and the pears were dead and dying, a great many of them. On tract 17 were peach fillers and they were also in bad condition. They were not alone dead and dying but had curly leaf quite badly.

With reference to drainage, it would naturally drain poorly on account of its being so level—it was practically level and especially so on the south side of the tracts.

I wouldn't consider the soil an orchard soil for the reason that it is in such a condition that plant life, as far as orchard products, could hardly subsist and make a luxuriant growth. Crops would be poor; that is owing to the close texture of the soil and its poor drainage.

In digging for the soil and subsoil, we found the decayed vegetation was not deep; owing to the close texture it can't penetrate. It is near the surface, and root growth is poorest near the surface.

Soil of the nature that we found, growing a wire grass would be prejudicial for orchard purposes as it is indicative of wet land, and wet land is not conducive to the best growth for orchards.

The two smaller waterways that ran across the land were possibly two or two and a half feet deep. Two ditches went across the tracts; one, as I remember,

(Testimony of T. E. McCroskey.)

possibly half way across 19, running from the north to the south; that is the one to which I referred a moment ago as not running entirely across the tract; the other one was near the line between 17 and 18 as near as I could determine.

I noticed the tract north of 17 across the road and it is considerably higher, but we didn't make any examination of the soil; there are surface ditches on that entire tract, I believe, as far as I examined.

CROSS EXAMINATION.

My last answer referred particularly to the tract north of 17. It is considerably higher than 17 and drains two ways; it seems that it is a little higher, possibly not directly in the center there, because it runs diagonally. I think the elevations run diagonally across the tract as I remember. I went on that tract just north of 17 but didn't make any examination of the soil; we were looking at the condition of the trees, which was poor I would say. They weren't as thrifty as they should be; there was too much water in the soil. I didn't dig into the soil.

Q. And you are basing your statement now of too much water on your trying to account for the appearance of the trees.

A. I think so.

In our examination of these tracts, we did not go down to bedrock or any rock. I went over 17 quite well

(Testimony of T. E. McCroskey.)

and did not see any rock on it as I remember. I think I would have seen the rock if it had been there.

I couldn't say how much higher the tract north of 17 is, than 18; the best estimate I could make would be that I think those waterways were made by the surplus water in the spring, and as a usual thing, water in soils of that texture, will not cut their way where there is a fall of less than four or five feet to the thousand.

Q. You say the southern end, then of the lot just north of 17 is twenty feet from the northern end of lot 17; there wouldn't be much difference in the two lots at those places.

A. No there wouldn't.

There is just a gentle rise; the entire plat is flat.

I know that the apple and pear trees died on that tract by the examination I made on both my first and last trip. Both trips were made in the same year, and the trees were then dying and dead, and the foliage showed lack of plant food.

The foliage on pear trees is entirely different in color from the peach trees, but it didn't show as rank or green as it should; some of it was dying; the foliage on the peach trees in quite a number of instances had curly leaf which indicates a germicide disease of the peach tree. This is not due to the soil.

I should think three quarters of an acre in tract 19 had the wire grass on it; there was a little on tract 18, not along the bank of the waterway I spoke of but near it. These places in 19 were at the end of the ditch or waterway where the water had come from that ditch

(Testimony of D. C. Pitzer.)

and spread out. The cutting of that ditch on through there would have removed all that if it had an outlet; it would assist it, at least. I did not examine in that vicinity to see whether an outlet could be found for the ditch across 19.

D. C. PITZER

Called on behalf of the plaintiff, testified as follows:

I have resided in Portland for about a year and a half; prior to that time I lived in Umpqua Valley; I came there in 1875 and have been residing there most of the time since. Part of that time I was farming; part of the time gardening and fruit raising, and part of the time in the real estate business. I was in the fruit and garden business about twelve years; the orcharding was included in that time.

I am very familiar with the land and soils in the Umpqua Valley.

I am somewhat familiar with the orchard tracts in and around Wilbur and have been over lots 17, 18 and 19 in plat D Roseburg Home Orchard Tracts several times, showing it to parties that had purchased lands there, and even before the Harding Land Company got it into their hands, my partner and I had it for sale, in 1908, for something like a year, I think our time was up about the first of January, 1909. The Rices owned it at that time—two or three of them interested in it. It was listed with us for sale. We had it for

(Testimony of D. C. Pitzer.)

sale for \$30 an acre but did not make a sale on it. Plaintiff's exhibit C is a plat of the land.

EXAMINATION BY THE COURT.

These three lots here are 17, 18 and 19 (indicating). Here is the road; this is the east of the road this is north; on this side it is comparatively level. A little higher, and in here is a low place. A low place running right down through this lot here, no. 4, east and west. Then there is a ditch cut right down through there. This used to be in timber; brush here and it was low, wet land all through here. No. 19 is a little bit of a knoll right here, and in here is a low swale coming down through 19. This land all slopes to the east; the whole business slopes to the east; runs up here, this is high mountains. All of the water comes off here hunts the low places, coming right down on these tracts here, and also right down on this tract here.

Court: You mean the water from the mountain comes down off 17, 18 and 19?

A. Comes down onto these so that it makes these tracts here—now it is a little bit higher again over in here. That is the northeast part. A little higher over in here, and the water naturally goes across on to these tracts here; these tracts being lower than these two here, the water from these, some of it, comes in here, and some of it goes over on these tracts—understand?

Defendant's Counsel: I would suggest saying these tracts would not get into the record at all.

(Testimony of D. C. Pitzer.)

Court: You mean the land is higher over——

A. A little bit higher.

Court: That is on 11, 12, 10 and 13, 9 and 4, than it is on 17, 18 and 19, and the water drains through 17, 18 and 19?

A. Yes, the water drains right away and it is lower on 4 and 5 than it is on 11, 10, 12 and 13.

Court: The water that drains north——

A. It goes off this part, off in here, and goes down in here, goes down across the road here.

Court: Oh, it doesn't go down to 17 and 19?

A. That is, the water goes all off of here down here and runs here.

Court: He is referring to lot 40 and the rest off there.

A. Yes 40, and this one here; 39 and 40. Naturally goes into this low place that runs through 19, here.

Part of this land was used for farm, raised wheat and oats, and this up in here had some timothy on it and red top grass; all along through here cheat grass.

Court: Cheat grass and red top here, 19 and 18?

A. Yes, and along through here.

Court: 17 and 18 and 19 and south of there.

A. Now, here was grain in here, and that was in brush here.

Court: Grain in 9, 10, 11, 12, 13 and 14.

A. And again over in here; had been farmed over in there; this here was growed up to what is called cheat grass and red top, all this in here. When we had it for sale as a ranch.

(Testimony of D. C. Pitzer.)

Court: What kind of wheat crops did it grow?

A. There wasn't any on it the year we had it at all; had been a year or two before that.

Court: Do you know anything about it before?

A. No, I don't know; there was no wheat crop on it the year we had it at all.

DIRECT EXAMINATION CONTINUED.

Referring to Plat and Tract D, I think some on the west of the road that runs through to Stevens is suitable for orchard purposes.

I have not examined the soil particularly; it is what I would call free soil. It is not the same soil as that down on the level covering these same tracts; it is a soil that is easier to work. On 17, 18 and 19 I would call it adobe soil. That is what is termed black sticky land hard to cultivate. You can hardly plow it; the plow won't scour; it won't slip off the plow. That is land that plows really the best when water is all over it. Then when the water goes off and it gets dry it is as hard as a rock. It is hard to cultivate it at any time of the year. You could plow it dry and go on it with clod mashers and big harrows and disks, etc., and you may cut it up and get it in some sort of condition, but it is a hard proposition.

From my observations of these tracts and those in controversy, 17, 18 and 19, the drainage is rather poor on account of the water coming off the other land down onto them, and they being much lower. A great deal

(Testimony of D. C. Pitzer.)

of the water that would come on top of these lots in controversy would have to escape by means of evaporation.

There are two or three reasons why I wouldn't consider tracts 17, 18 and 19 good orchard tracts. In my observations in the Umpqua Valley in traveling over the different localities, I have never been able to find a first class apple and peach orchard on land lying like that, and of that character of soil. Another reason is from the simple fact that the W. C. Harding Land Company had expert horticulturists, expert farmers a hold of Plat D and the simple fact that there isn't an orchard on 17, 18 and 19 looks to me like it wasn't very good fruit land. A great many of the trees died; it wouldn't raise apples and peaches.

I have known of one or two orchards that have been planted on similar lands; out east of Roseburg about 4 miles on land similar to this planted and cared for two or three years; the trees didn't do any good and they abandoned the proposition because they wouldn't grow. There is an orchard that is fifteen or sixteen years old, lying near Roseburg that is on similar land, especially part of it, that the trees are not doing much good. The apples are not very highly colored. There are Spitzenbergs, Newtons and Baldwins in this orchard, and they have been for some years well taken care of, and under the condition that they were in, first class orchard, first class fruit had to be sold at a reduced price on the market there at Roseburg. The fruit was pretty small.

From my experience in orcharding, young trees

(Testimony of D. C. Pitzer.)

planted on a plat and neglected or poorly taken care of during the first two or three years would be stunted and cause them to die. It takes a longer time to get results out of a stunted tree.

I have been all over the tracts known as Garden Valley a good many times. It is a different character of soil altogether. It is a sandy loam river bottom land, and biggest majority of it. There is some of that runs up into the lands that is a little elevated, but it is different land from this.

CROSS EXAMINATION.

I call this land a black sticky mud, that we have down here in the Umpqua Valley and on this land in 18, 18 and 19.

I understand what we mean down in the Umpqua Valley by black sticky land. This land, Plat D, is the same character as what is called black sticky land.

I know the people personally that handled this land. Mr. Green is one and Mr. Wright is their horticulturist. Mr. Wright was considered an expert and drew expert salary. I had no reason to doubt him. He was one of the men I had in mind when I spoke of the experts of the Harding Land Company.

Himes & Oliver had charge of the orchard four miles east of Roseburg; I don't know who owned it. It is a 200 acre tract laying on the left hand side of the road about a mile and a half this side of Dixonville. It was planted and attempted to be cultivated there, and a

(Testimony of D. C. Pitzer.)

great portion of it they abandoned altogether as an orchard proposition. I don't know why but the trees didn't grow. I am not prepared to say whether or not that is due to the character of the soil or to the quality of the trees. It might be that thousands of fruit trees set out in the Umpqua Valley died because of defects in the trees themselves.

I don't know whether the trees on this Himes & Oliver land died because they were that kind of trees. I only know they abandoned the operation. The orchard business too took a kind of slump in 1910; that might have been one of the reasons; don't know. They didn't abandon all this orchard. There was a part of it that lay on higher land there, they have taken good care of, and it is growing. It was on the same tract. I think they were all apple trees.

I couldn't say whether the slump in the orchard proposition discouraged them from replanting those that died. It seems as though the demand for orchard lands has tremendously decreased in the last year or two. In 1910 it was very good.

I spoke of another orchard, but I forget the man's name that owns it. An orchard just across the road from the fair ground, north. The west half of that orchard is very low, wet land.

The man that owns it had been there two or three years and he took extraordinary good care of it, and some of his trees up in the higher land, east of his house, had very nice apples, but around the low wet place his apples were very poor and very poorly colored and were

(Testimony of D. P. McKay.)

small. He had Spitzenbergs, Newtons and Baldwins, all apples.

I don't know whether or not a fruit orchard man in the Umpqua Valley will plant apple trees on black sticky land. Some small patches of black sticky land have been planted recently to apples. If I were a real estate man and offering a man a piece of land as fruit land, and the land was black sticky land, I would not advise him to plant apple trees on it; if he were going to plant fruit trees I would tell him to plant pears.

With reference to the orchard north of the fair grounds, I do not know whether or not the bedrock comes right up near the top of the ground on which the trees didn't do well; I never investigated that; I know wet land, I have been on the land; I know black sticky land and wet land and I know the trees didn't grow very well; I didn't investigate the bedrock at all.

D. P. McKAY

A witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

I have been a farmer and am in the general merchandise business at present, and have been about ten years, and I was always before that a farmer.

With reference to this Plat D, I lived on the farm two years, in 1886 and 1887; I farmed 250 acres of the land; it is the same land that is also known as the Jack

(Testimony of D. P. McKay.)

Chenowith place, and contained somewhere near 490 acres. I have been deputy assessor there.

The hill land all lies south of the road running through the place, and the bottom land all lies east of the road. Roughly speaking there must be 250 acres of land that could be farmed and the rest of it would be hill land. That outside of the 250 acres we never considered for cultivation. Some of the hill is pretty high and some of it has got timber on it; pretty good grass land, some of it. The 250 acres would include the fringe of land along the road on the left, and that other land platted on the right.

I farmed 17 and 18 since it was platted; I never farmed 19. We used 19 for pasture. There was nothing in the soil of 19 that would have prevented us from farming it, had we so desired.

I farmed 17 and 18 two seasons. We raised wheat one season and oats one season and had good crops both years. The soil on 17 and 18 was good soil, produced good grain and cultivates easy. It is free soil, nice soil to cultivate. It is not what would be termed black soil; it is kind of gravel loamy free soil. It is soil that cultivates very nicely. There is no part of 17 or 18 that could be called swale land; we never had any grain bowed down on it.

Referring to plaintiff's exhibit C, the plat, there is a ditch between or about on the line between 17 and 18 and 19, about 2 feet deep. I went to all the corner stakes all around all of these lots and located every stake, every corner, and between 18 and 19 there is a

(Testimony of D. P. McKay.)

ditch about 2 feet deep and it is made a little bit in this shape, and there is another ditch over here near the road. Now, on 19 there is a little kind of a low place here, but it slopes up next to the fence; a little hill makes around here a little slope; this ditch starts here and goes off a little this way and this goes off down into the main swale.

EXAMINATION BY THE COURT.

Q. Mark these ditches will you please; take your pencil and mark the ditches where they are?

Well it starts up there say toward the northerly boundary of lot 19 and you go southeasterly direction and down into the other lot below of course and apparently a little in that direction and empties into the swale.

DIRECT EXAMINATION CONTINUED.

I don't know of any ditch in 19 which is brought to a stop and doesn't provide for carrying the water off. If there is such a ditch I would certainly have seen it.

On 17 there isn't any ditch that interferes with the lot at all. On the east corner here, there is a little low place right there, but it doesn't hurt the lot at all. It isn't a natural ditch or slough or anything of that kind. It is just a kind of a low drain. There is a ditch, you know, goes down all the way, a deep ditch; drains the country above and comes down here; has been there for

(Testimony of D. P. McKay.)

years; it was there when I lived on the place. I have been down in the ditch; it is as deep as I am in places. Now this soil is the same as 17 and 18 all the way down and you strike a kind of clay and gravel down here, and goes on down into the creek that empties and drains the country above; and there is no ditch at all in 17 aside from this little drain right here, and that has no water standing in it at all; if this creek here, that comes down would get full and run over, why, it would be like any other low place; it would run through that low place right there for a little while; as soon as that would go down there would be no water on 17 at all; I never saw any water stand on 17; 18 and 19—we had a snow—one year while I lived on the place, the biggest snow I ever saw, 20 inches deep, and when it melted and went away, we didn't have any water standing there.

There is no ditch on 18 excepting the dead furrow between 18 and 19. That answers for drainage of 18 and 19.

Q. While speaking about drainage Mr. McKay, see if you can explain to the Court the lay of these lots. For example, compare lots 17, 18 and 19 with the adjoining lots, 12, 13 and 14. Show the Court how the land lays there, with reference to slope, etc.

A. Well, this is a very pretty valley from the swale down here all the way up, and it has just got a little slope all the way. There is no difference in 17, 18 and 19 from those above this road. Across this valley here, or bottom, any more than the natural slope. Of course it would naturally be a little bit higher but no

(Testimony of D. P. McKay.)

higher than just like this floor if one end is raised just a little. Lot 11 is naturally a little bit higher than lot 19, but 19 with your natural eye to look at them, have both got a slope; comparatively on the level alike.

The map shows between the two tiers of lots, 12, 13 and 14 on one side, and 19, 18 and 17 on the other, a road, which I have been on. going along that road, on either side there is just a natural slope; it all looks alike; it looks level just looking at these lots. To realize the slope you would have to take a larger view of the valley, but go down here to the lower end somewhere and look that way, would be the best way to get at it.

It would be a correct description of these six lots to say that it is a level tract of land.

The top soil where we farmed, is about 18 or 20 inches deep. I don't know how deep the subsoil is. I never struck bottom in it. The ditch that drains in the immediate vicinity of 17 is 6 or 7 feet deep. As far as it goes down it doesn't show hard pan or joint clay; it just looks natural to me; of course, I am no fruit man, no soil man, any more than the natural farmer, but the soil is just natural like any other soil with good soil on top and you strike subsoil of clay and it goes right on down as deep as that ditch is washed out and has kind of gravel and sand in the bottom of that ditch. The subsoil will drain all right; the land is porous enough to soak the water through all right. As to the top soil the water won't stand continuously right in one hole but will soak down. In my experience with the land we never had any trouble with it whatever.

(Testimony of D. P. McKay.)

I am acquainted with a class of land in the Umpqua Valley which is called black sticky land and sometimes black mud. Of this land that I plowed in 17 and 18 there is no land that can be said to be of that character. I have no reason to believe that there is any of that kind on 19. When I farmed the land I found the surface drainage sufficient to leave the land in proper condition for raising grain. I never saw any cracks in the land in the summer time. I have never at any time seen any cracks in it.

The quality of the soil is above the average in that locality. That farm was always considered a good farm and it is above the average.

I acted as deputy county assessor for two years. The market value of that land at that time was all the way from \$150 to \$300. That would be about 1910, 1911, 1912 and all along there. It is hard to tell what it is worth today as there isn't so much real estate changing hands now. Market values have taken a slump in the last two years and this applies to orchard lands too. Two years ago some land was being sold and pretty good prices being paid, I think as much as \$250 per acre, perhaps for that class of land here, two years ago; but I have heard all kinds of prices talked, and I don't know that I would be capable of saying just what the market value would be at that time.

I passed by there a number of times in 1911 and 1912 and observed the fruit trees; they looked very nice for young trees.

When we were out there the other day the tracts on

(Testimony of D. P. McKay.)

the opposite side of the road as we crossed the field looked very well; the trees were growing nicely. Most of the tracts were cultivated, corn between the trees, and they haven't been cared for as they should. Some grass growing around the trees, buty they made a good growth. Some of them had apples on and the orchards looked well.

Q. Now, is there any difference between the soil on which those trees were growing that you just now spoke of, and the soil on 17, 18 and 19.

A. Well, the lot, 17 and 18, I have plowed right through the bottom all the way, before there were any fruit trees there; I never could see the difference in the soil where 17 is and the lot right across the road from 17, never could.

In fact, before platting and making the road out there, there was nothing to mark the transition from land which is now on the left hand to land which is now on the right hand.

When I farmed the land 17 and 18 produced just as well as this other land we are just talking about—19 I never plowed.

EXAMINATION BY THE COURT.

The yield was about 25 bushels of wheat and on the average about 40 bushels of oats. On any good farming land you will get more bushels of oats per acre. (It might be true that you can raise oats on some land successfully that you can't raise wheat on it, I don't

(Testimony of D. P. McKay.)

know. As to the necessity of plowing this land when it was very wet, I would agree to that because I think there has been too much of that kind of farming done. If you plow the land when it is very wet, it is apt to bake and be hard to pulverize; more so than if you plow it when it is in good condition to plow.

DIRECT EXAMINATION CONTINUED.

I never saw any part of 17, 18 and 19 overflowed with water. When I was there the other day there seemed to be grass and weeds and some wild oats, some tame oats, some timothy, some clover. On 17 there was a very heavy crop of volunteer stuff of different kind. Would have made good hay if it had been cut. It was wild oats and grasses of different kinds. I saw quite a bit of timothy. It was a rank growth about waist high to me and I am pretty tall.

I have plowed 17 twice and I have never found any rocks on it yet and didn't find any when I was there the other day. On 18 I never found any; 19 of course, I never plowed, but I have been over it a number of times, riding horseback, and I never saw any rock on it, without it was under the ground, none on top. The ditches on the land did not expose any rock, boulders or anything of that kind.

CROSS EXAMINATION.

I had no trouble with the bottom land as to drainage; it drained easily. In farming bottom land, when

(Testimony of A. L. Kitchen.)

we get through harrowing we would always open up a dead furrow toward the way it was plowed so if we had a heavy storm of any kind the water would have a chance to go right on out. There is plenty of fall there for it to drain all right, but if we leave it all banked up there with loose dirt in this low place, of course, it would naturally be a little lower where the dead furrow was; that goes out so slow it may kill some grain before it goes through, so we just run a light furrow there, that wouldn't be hard to get over with a header. That is all the drainage we ever did. The soil would permit the water seeping through it. We had no trouble with that bottom land as to water standing in puddles or draining out in that way.

Q. What do you mean when you use the word "Porous"?

A. I mean there is a kind of clay in the Umpqua Valley, back mud, or blue mud, that the water—we use to have a saying that the water would stand all winter in a horse track in some kind of soil.

Excused.

A. L. KITCHIN

A witness on behalf of the defendant, testified as follows:

I am manager of the Umpqua Valley Fruit Union, which is a co-operative organization of the fruit growers of the valley.

I have had about twelve or thirteen years experience

(Testimony of A. L. Kitchin.)

in the nursery business. I had experience in planting orchards both in Jackson and Douglas Counties.

I am acquainted with the land platted by the Harding Land Co. near Wilbur, known as Plat D. I have known that land practically ever since I have lived in Douglas County—the last seven years at least. I pass by there in going to my orchard. In doing so, I have noticed fruit trees on the bottom land there; those on the cultivated land have always shown thrifty growth, while those on land that has been neglected for the last two or three years don't show so much growth.

I have made a careful inspection of the lots on that tract known as 17, 18 and 19. I can't give the date, but I believe about ten days ago. At that time there was growing there a number of different kinds of grain and weeds of all kind. Some grain as high as my head and various kinds of grasses. There was alfalfa, and red clover I noticed particularly and timothy growing and bearing fruit. We passed all over three lots and in our observation there, while we didn't go over every tree, I only found one dead apple tree. The pear trees and apple trees that we examined were all alive with the exception of this one. Quite a number of the peach trees were dead but some were alive too. Quite a number bearing peaches at that time. We ate some of the paches off of the trees. I am confining myself to lots 17, 18 and 19. Newtowns were the only variety of apple I saw there—Newtown Pippin that was bearing.

I examined the trees to see if they had made any growth. They hadn't made much growth this last year

(Testimony of A. L. Kitchin.)

but had apparently made a fairly good growth the year before. A great many of the limbs had grown from two to three feet last year. It was perhaps that many inches for this year. Of course, this has been an extremely dry year in Douglas County, and I guess all over Oregon, and there had been no cultivation of the ground. The weeds and grass and grain had grown up around the trees and taken up all the moisture so that there was no opportunity for the trees to grow.

Across the road lying immediately to the north the trees were growing in good thrifty condition. The cultivation had been fairly good on those.

The soil across the road and on lots 17, 18 and 19 was identical so far as I could observe. There is no *preceptible* difference in altitude, or slope between one side of the road and the other.

We dug down in the bottom of the ditches to see if there was any apparent difference in the soil there, and while there was of course, as we went down in the ground a little difference in the texture of the soil, it was practically the same soil. A little lighter in color as we went down. The top soil was something like 18 or 20 inches deep; I didn't notice exactly. The difference between the top and subsoil is very slight; just a little lighter colored. We looked especially for hard pan or joint clay but found nothing of the kind, and found nothing that could be said to be impervious to water.

I am familiar with the land in the Umpqua Valley sometimes called black sticky land and sometimes black

(Testimony of A. L. Kitchin.)

mud. I didn't see any of that character of soil on lots 17, 18 and 19. I wouldn't say that there positively was not any of that character on any of those, but our examination didn't reveal any land of that character at all.

I have never seen a rock on any of that land as big as a hen's egg. I saw a little bit of fine gravel at the bottom along the ditches where we examined, but no rock.

I heard the testimony of D. C. Pitzer in court yesterday afternoon, and remember his referring to two tracts of land, one 4 miles east of Roseburg under the care of Himes & Oliver, the real estate agents and another tract opposite the fair grounds near Roseburg. I know these tracts of land.

The Himes & Oliver tract is real black mud, a good part of it. The land was planted under my direction. I sold Mr. Hopkins the trees and he told me to see that the care-taker had proper instructions about planting, and I instructed him also about pruning the trees; told him to cut them off about knee high after they were planted. Instead of that he just topped them a little bit, and left them about three or four feet high. I went out there and looked the ground over, the land, the orchard part, and observed they were not cut down low enough and I told him that they should be cut lower. He said he would do it. I went out again in June of the same year and he had just then cut them down. This first time I was there in April, and he had just cut them down about the middle of June. The result was he had cut off all the growth of the tree and

(Testimony of A. L. Kitchin.)

the trees died, simply because they had been cut off in the middle of the summer. The death of those trees was not due in any manner to the character of the soil.

The tract opposite the fair grounds has never produced a profitable crop for the reason that the bedrock is too near the surface, varying in depth from six inches and I don't think that soil is a foot and a half deep anywhere until you strike the bedrock on that tract. This explains the failure of that orchard. What little soil there is in the orchard is black mud.

Across the road the foliage was on the trees and they looked thrifty and green. The grasshoppers tackled 17, 18 and 19 and didn't get away with these others, because of the grass and weeds that were there to protect them.

Previous to this time I had often noticed particularly, the foliage on the trees in this bottom land of the same character as 17, 18 and 19 and they were green and thrifty; if there had been too much water there it would have had the effect of turning the foliage yellow.

RE-DIRECT EXAMINATION.

It is the custom in Douglas County to plant orchards on bottom land because we consider it much the best land and it is generally understood that peaches thrive better on poorer soil.

(Testimony of R. W. Hinckley.)

EXAMINATION BY THE COURT.

Peaches thrive better on poorer soil than apples is my experience. That is also the universal experience in Douglas County. I haven't the dates when these three lots were planted in trees but it was about five years ago. I was over them a number of times the first two or three years after they were planted, consulting with Mr. Green who was the care-taker for the first two or three years, and they were well cared for and made a satisfactory growth during that time.

R. W. HINCKLEY

A witness on behalf of the defendants, testified as follows:

I live about 6½ miles from Roseburg in what is known as Garden Valley; at the present time I am developing some orchard land there that I own myself. I have lived in Oregon since May, 1908; I was connected with the Harding Land Company from November, 1908, until about September, 1909, when Mr. Harding and myself bought a tract of land in Garden Valley and sub-divided it, and sold part of it. I was acting as a sales agent and doing work in the office. I had no stock or any connection of that sort with the company and was working on a commission.

I know Mr. Hart and met Mrs. Peterson but once on a visit that she made to Roseburg to see the land; I went out with her at the time. I never met Mrs. Hart.

(Testimony of R. W. Hinckley.)

This was in May, 1913. I am the gentlemen referred to by Mrs. Peterson as Mr. Kinckley who had gone with her to lot 17. I omitted saying that the Harding Land Company again employed me from September, 1912, until July, 1913. I was then secretary and treasurer of the company and went in at the time Mr. Wallace left the company. It was during this time that Mrs. Peterson went to Roseburg.

Mr. and Mrs. Peterson both visited the land, and I took them out in an auto. At that time the tract looked to me as though it had just been disked; gone over with a disk presumably and the dirt had been thrown towards the trees a little and had a little rough appearance. Very few weeds on it at that time and the cultivation was such as in the orchards generally at that time of year. In the cultivation of orchards after using the disk I have always gone over with the harrow. The fact that there were some clods would not necessarily indicate a lack of care at that time.

The apple trees looked to me about as good as the average apple trees at that time. The peach trees were not as well and the pear trees had just been put in I think the year before. There were a few pear trees that had been re-set, put in where the peach trees were. They appeared to me to be about the regular size tree of that age. The trees were always pruned during the winter and this was May, and they naturally would not have made their full growth for that year. They were cut back quite severely in the winter time so there

(Testimony of R. W. Hinckley.)

wouldn't be much old growth left there from the previous year.

The practice as to pruning varies. The first years when trees are set out they were whip trees; we always set them four to six feet long, and cut them back at the end of the year eighteen inches; when they are set out that spring or the first of the second year, they will vary. Some of them cut back as close as 12 inches of where it was cut off the first year.

Assuming that these trees on lot 17 had been planted in February or March, 1911, I think they showed as much growth as they ought to have shown during that time taking the pruning into consideration.

Mrs. Peterson didn't like the appearance of the orchard. She looked for larger trees and my recollection is that she spoke about some trees that were on another tract that I understand were a year older. She expected from what she told me, to see trees of that size. She also *tought* the ground a little rough.

I saw no rocks there except small gravel over towards the draw, in the southeast corner of 17; it was just small gravel that you would find in any of these dry runs along the creek. Most of the gravel was in the run. I think there was a little up on the bank, but nothing but what you would find anywhere along. I should judge the run was five feet deep; I didn't measure it. There was nothing in the nature of stone or rock boulder on the surface of 17 where we went and Mrs. Peterson did not mention it to me, or claim the land was rocky.

(Testimony of R. W. Hinckley.)

After we had examined this lot I heard part of the conversation at least, had between Mr. and Mrs. Peterson and Mr. Harding. It was held in the office of the Harding Land Company I think the following day. The substance of it was that we agreed to plant pear trees in place of the peach trees on the tract the following winter, and we gave her a written statement. I believe they left the office and we were to write out this statement, and Mr. Peterson came back and I gave it to him. Mrs. Peterson was there and heard and understood what was said about settlement. I wrote out the memorandum; I won't say whether Mr. Harding dictated it to me, or whether I wrote it out myself, but I wrote in on the typewriter myself. I don't know whether that was introduced here in evidence yesterday as I didn't see that statement introduced. The agreement I wrote out was the agreement that I heard talked there among them. I understand that Mr. and Mrs. Peterson accepted it as satisfactory as nothing was said otherwise.

I heard no conversation between Mr. Glenn D. Hart and Mrs. Harding about these other two lots, 18 and 19, that I remember, other than regarding the cultivation. That was during the winter sometime of 1912-1913 in the office of the Harding Land Company before Mr. Harding, Mr. Hart and myself. As I understood it, the Harding Land Company's time for cultivating that land was up with the season of 1912, and Mr. Harding and Mr. Covallho had made some arrangements for the cultivation in 1913, and Mr. Hart asked me to write

(Testimony of R. W. Hinckley.)

out a contract between him and Mr. Covalho for the cultivation during 1913, which I did. The cultivation was to be at Mr. Hart's expense, and the contract covered lots 18 and 19 in Plat D. Mr. Hart made no complaint at that time that I heard. He requested Mr. Harding or I to sign the contract with Mr. Covalho for him, because he was going to leave at that time, or that night. It was written out, and Mr. Covalho signed it, and I think Mr. Harding also signed if for Mr. Hart.

Q. Now with reference to the Peterson matter, I hand you Defendant's exhibit 28 and ask you if that is the writing you referred to as having been prepared by you with the typewriter.

A. Yes, I think this is the one.

CROSS EXAMINATION.

If the Peterson tract had been planted in the fall of 1910, there would be the summers of 1911, 1912 and 1913 for the Harding Land Company to take care of it under their contract if it provided for three years cultivation of the trees.

I had some trees myself in the Garden Valley tract. At the time I was out on the Peterson tract, there wasn't a great deal of difference in the growth and appearance of the trees on tract 17 and those in Garden Valley that had grown an equal length of time.

RE-DIRECT EXAMINATION.

There are more or less trees on any of the tracts that will die during the winter, and naturally we will

(Testimony of E. P. Drew.)

replant them the next year, and there are always some small trees every winter. On my five years orchard, I am even replenishing last winter, and I will have to this coming winter, a few trees, not many.

(Excused.)

E. P. DREW

A witness on behalf of the defendants, testified as follows:

I have been a nursery man for 34 years. I have had experience in Cuyahoga, Ohio, and Douglas County, Oregon. Have been in the nursery business in Douglas County for fourteen years. I have had experience in examining soil and determining its adaptability for fruit trees. My experience in handling soils would cover 33 or 34 years.

I was county fruit inspector of Douglas County. There has been a regular boom along fruit lines, and planting orchards there three or four years ago; I think it was about at its prime in 1910 but it is very poor now.

I am acquainted with a tract of land located near Wilbur platted by the Harding Land Company and known as Plat D. I was first over the land in 1905 and have passed it a good many times and made a special examination on September 15th last, at your request.

I examined the top soil of 19, took a sample an inch deep about the center, and took a sample of the subsoil. We made a general examination of the growth of the

(Testimony of E. P. Drew.)

trees, weeds and grasses on 19. We went almost to the south end of it, and we examined the ditch that run through it north and south almost to the center. It makes a connection with other water below the lots. We found wild grasses, wild oats, cheat, wild cheat, velvet grass, timothy, rib grass and some grass that we call horse-tail. It was exceedingly rank growth.

There is a slight change between 18 and 19; the soil is lighter but as far as the growth is concerned, it is practically the same. On 17 the soil is still lighter. It has some alluvial deposit on it, some silt which would make it a finer clay. I do not think that improves the soil for fruit growing. The growth on 17 as compared with 18 and 19 was practically the same; the varieties are pretty well mixed all over the three ten-acre lots.

There were apple trees growing there and some small pear trees, and a few peach trees. I am speaking now of all three lots. The trees were in a rather peculiar condition, according to a nurseryman, and a soilsman, or a plantsman. The trees ought to be dead; I couldn't understand why they were not; according to the care they had, they ought to have been dead, but they apparently were still hanging to life. They had no leaves, or practically none; it seemed as though the grasshoppers or something had eaten them off; at least the grasshoppers were still eating when I was there. I should judge the growth of this last year would average ten inches and it seemed to me the rate of growth ran about from 6 to 18 inches, of this year. I could tell from the nodes where it stopped growing last year.

(Testimony of E. P. Drew.)

I examined a few trees on each lot. I found one or two apple trees dead, and one or two pear trees; I didn't pay special attention to how many were missing. There were only a few peach trees that I could find, and some of those were dead. There seemed to be more on lot 17 than anywhere else.

The trees ought to have been dead on account of neglect and no cultivation. There are very few young trees that will stand two years in succession of no care whatever. The grass and weeds and one thing and another will sap the trees and they will die from lack of moisture and plant food. This would be the case even on the best soil.

This is a sample that was taken one inch below the surface in lot 19; that is the blackest one in the lot.

Said sample offered in evidence and marked Defendant's Exhibit 30.

There has been water added to that as it was dried out, and the water was added to show the color when wet.

This is a sample taken on lot 19 three feet below the surface, or the subsoil.

Said sample offered in evidence and marked defendant's exhibit 31.

That is what we call the dark clay loam.

This sample was taken from lot 19, about the center, one inch below the surface.

(Testimony of E. P. Drew.)

Said sample offered in evidence, and marked defendant's exhibit 32.

This was taken 2 feet 6 inches below the surface of lot 18, about the center of the lot.

Said sample offered in evidence, and marked defendants' exhibit 33.

This was taken from about the center of lot 17 one inch below the surface.

Said sample offered in evidence, and marked defendant's exhibit 34.

This sample was taken on about the center of lot 17 2 feet 6 inches below the surface, and is a sub soil sample.

Said sample offered in evidence and marked defendant's exhibit 35.

This sample was taken 4 feet 6 inches below the surface of lot 18; it was taken one foot below the bottom of a ditch that ran through 18, which was a little over three feet deep; I dug down a foot below the bottom of that ditch.

Said sample offered in evidence and marked defendant's exhibit 36.

There is no line that can be drawn between the top soil and the subsoil. It all depends upon the depth of the plowing, how deep the humus and vegetable matter

(Testimony of E. P. Drew.)

that is plowed under; if you plowed it four inches, then you only have four inches top soil; if you plowed it 18 inches you had 18 inches; it is a question I couldn't determine. This soil is just one general character all the way down, and I should think was at least eight feet deep.

Q. What was the deepest ditch you noticed on any part of the land?

A. This sample, four feet six inches, was the deepest I saw on the place.

These different samples, we designate black clay loam. I have worked in lots of that kind of soil. It is rather hard to cultivate and work unless it is done in the proper time. All soils are that way, except sandy soils and *gravelly* soils, and you must have regard to the weather conditions in cultivating. This soil is not as bad to work as some soil in that locality. I own similar soil to that and work it. This kind of soil has a tendency on apples to grow too much to wood growth; that is the only objection I have to it; but to the growth to apples, we consider this a little bit strong for apple growth.

Q. There is no objection to the soil as being poor, or barren or not rich?

A. The contrary.

There was no difference whatever between the ridges in the tree rows and those out in the center. It is natural to plow towards the trees, the first plowing, and the next plowing plow away. Of course, the first plowing, when you plow to the trees, makes a ridge in the tree

(Testimony of E. P. Drew.)

row. There is no other way to do it, if you plow to the tree row, because you work back again in order to make it level. When we made the examination the ground had been plowed without being worked back and was ridged around the tree row.

It is not true that all the productive top soil was thrown up into these ridges. That would not be possible on that kind of soil with ordinary plowing; it is ridiculous. I found top soil everywhere over the tract.

I am familiar with a soil in the Umpqua Valley called black sticky soil or black mud. There is none of this soil on lots 17, 18 and 19. When that black mud is dampened, it is as black as a cat you might say; I don't know anything that is blacker than that; that is as black as it possibly could be. It doesn't take an expert down in that country to know black mud when it is wet; the children know it.

There was no such thing as rock or stone on 17 that I could find. I looked especially to see if there were any rocks or boulders there.

I have visited a great many parts and parcels of soil in Douglas County for different people who wish to buy and some of these orchard tracts I have visited and examined for people who want to buy, to pick out a tract for them, and in that way it made me somewhat familiar with the market value at that time, in 1910, 1911 and 1912, and before that. I should say that the market value of these lands in 1910 was anywhere from \$200 to \$250 an acre; it is according to their locality. At this time it is considerably less. The bottom has

(Testimony of E. P. Drew.)

dropped out of the value of fruit lands. The slump began about 11½ years ago.

Lots 12, 13 and 14 as compared with 18, 17 and 19 are a little bit higher naturally because the flow is from north to south. The difference is so slight that it would take a trained eye to detect it. My impression in going between these two tiers of lots was that I was crossing a level tract of land.

I noticed an orchard growing on lots 12, 13 and 14 in fair condition. There were Newtown apple trees and I think I noticed Spitz too. Also quite a number of peach trees. The cultivation wasn't real good, could have been better. It is all practically the soil exactly as in 17, 18 and 19.

There is no physical interruption of the surface, or mark or break of any kind between these tiers, except the roadway and a few dead furrows.

This soil will absorb water; it takes a little longer than sandy soil or *gravelly* soil, but it percolates it all right. There is nothing in the soil anywhere beneath the surface there which would stop the absorption of water.

Q. From your experience in planting, could you form an estimate of the reasonable value, say per acre, of planting these tracts, 17, 18 and 19, to the kind of trees that are planted there, including, of course, the cost of the trees as well as of the planting, and the care for the first three years, leaving out of consideration any expense that might have been incurred for clearing the land before planting?

(Testimony of E. P. Drew.)

A. We have taken contracts for \$25.00 per acre for the first year; for planting it and taking care of it the first year; and ten to fifteen dollars the following two years, according to what is planted there, and how far apart. I mean per acre per year.

I have in mind a similar soil to this soil in these figures. I think that is about as low as you can get it.

Some of the trees on 17, 18 and 19 were over six feet; some would reach seven and a half; they were spindling however, and if they had been properly cut back, they should not have been over 5½ or 6 feet.

I could take these orchards on 17, 18 and 19 and still make successful orchards out of them.

I think the richness and quality of the soil on these lots for orchard purposes, is a little bit better than the average.

CROSS EXAMINATION.

If the land had depth, I would say that if it produced an extraordinary good yield of wheat and oats, it was well adapted for orchard purposes. I should say that this land was adapted to both grains and orchards—that is, apples and pears, nothing else. I base this statement somewhat on the idea that the plant food that is contained in this soil is the same plant food that goes to nourish fruit trees and grains alike. The plant food contained in this soil that makes it particularly adapted for orchard purposes is humus principally, which is made up of decomposed vegetable matter.

(Testimony of E. P. Drew.)

When it is separated into its elements we have nitrogen, phosphorus potash and several others. I would consider this soil rich in those elements, which are necessary for the production of good fruit trees. They are not necessary in the same proportion for wheat and oats; they do not require as much nitrogen as fruit trees.

Alluvial deposit means star dust, for one thing, that falls from heaven, ground up rocks, decomposed quartz and all rocks ground up in a fine state; washed down by the water as silt; when organic or decomposed vegetable matter is mixed with that, it sometimes turns it into a clay, if there is enough of it present. That is what makes our clay. If it is purely alluvial, and purely decomposed vegetable matter, then it is a clay loam. These lots are made up of that kind of soil.

There is no question but that that soil, lying there year after year on practically a level tract and the water coming down over it, would absorb the water, permitting it to seep through. The longer it stood there the more it would absorb, because there would be more silt collected and deposited on these lots. If it wasn't cultivated it would have a tendency to pack pretty close.

Cement is a term that some people use that they have no right to use; cementing the land means something that after it is dried, it is as hard as a rock, but all of this soil, no matter how hard it is, or how much it is compressed, it can be shaved with a knife. That isn't quite as hard as a rock; I wouldn't call that cementing, but slicking over; the finer particles would stay in one place and the coarser would flow on with the

(Testimony of Walter Adair.)

water; it would have to have some lime and burn it to cement.

Soil could get in such shape that water wouldn't permeate it readily but this isn't that kind. It would have to be the next thing to solid rock and gumbo. Gumbo is worse than black mud. It is as much worse than black mud as black mud is worse than sand.

The soil samples I brought down were wet to show the color; that is the only purpose I had in bringing them in; they were absolutely dry when I took them, and a little lumpy.

The best time to cultivate that soil is when it is dry; from sometime in April to the last of August or first of September.

You can handle this particular soil and make it pulverize. I wouldn't plow it so wet; plow it in the falls, in the first place and let the winter rains work on it. Then I would plow it back in the spring when it got dry enough, which would be easily done where if it wasn't plowed in the fall, and was plowed in the spring, you would have to wait until it got too dry, which would make it lumpy.

WALTER ADAIR, A witness on behalf of the defendants, testified as follows:

I am one of the owners of the tract of land known as Plat D. I have lived in Oregon since the first of March, 1909.

(Testimony of Walter Adair.)

Mr. Epperly's occupation at this time is farming near Roseburg.

I knew Mr. Burns in Colorado for about 14 years. He is a farmer.

Mr. Green has always farmed since I have known him and he is tending trees now on this identical tract.

Mr. Wallace has been in the mercantile business, with the exception of the time he was in Colorado, ever since I have known him as a boy.

I have had about 30 years' experience farming.

I saw this Plat D, just to look at it, in January, 1909. I made a careful examination of it in July or August, 1909, with a view of buying it. A few days before this Mr. Green that I know of, went out there, and I was told Mr. Burns and Mr. Epperly were there but I wasn't with them.

I am not a horticulturist and know nothing about fruit trees, but I was on an orchard at that time, and I knew where my best trees were; knew what kind of land they grew on there, near Roseburg. I went out there to Wilbur and I saw the same kind of land where my choicest trees grew, and then I encouraged my son-in-law to go into it, because there is where our best trees were where I was living near Roseburg. That is all I knew about it. In purchasing this land, I honestly believed it was good fruit land or I wouldn't have gone into it.

I had this money, I didn't expect to use it, and I thought I would put it in there, and I thought it was a good thing. To show you why I thought so, I paid the

(Testimony of Walter Adair.)

same price as the rest of them did to the company, including myself, for ten acres of that land. That was after it was platted.

I think our deed called for 461 acres. Something over 300 acres were platted, but that was not all sold.

I have ridden over lots 17, 18 and 19 on a disk and walked over all three of them with a harrow. It is as easy land to cultivate as any of it at all, if you go just when you should, but if you wait until late in the spring before you do the plowing, then I would say it was harder than it would be on the bottom soil, that is river bottom, sandy soil.

What I have said about waiting too late in the spring would apply to any soils generally that I have worked.

I had experience for three years in the orchard business in Douglas County and took care of three orchards. I have worked several different localities in the Umpqua Valley.

The quality of soil in 17, 18 and 19, as far as making growth is concerned, will compare very favorably with other good soils in the country.

The ten acres of this land I kept, I gave a contract, just the same as any other party who bought land on this tract; the same as Mrs. Hart and Mrs. Peterson, with the Harding Land Co. excepting I paid so much an acre. I paid, according to my contract, \$200 an acre and took the bare land, and then myself planted the trees or had it done, and cultivated them, in place of Mr. Harding doing it.

(Testimony of Walter Adair.)

Mr. Green took two tracts at \$200 an acre, and entered into a contract with the Harding Land Company just the same as I did. We both have this land at this time.

I planted in the spring of 1910. My son-in-law did the work for me that year, and planted it to apples and peaches, and they have been cultivated every year since. I cultivated them all of one year and part of another myself; the rest of the time he has done it. My lot is No. 9 in Plat D.

I have a very good orchard. All the trees that are living are in a thrifty healthy condition. There are probably a dozen apple trees and more than that many peach trees that have died. That is not out of proportion to any young orchard that I have had anything to do with, but rather better than the average.

My lot lies directly opposite 14; 14 lies just between 9 and 17. The soil of 9 and 17 is practically the same, but the ones towards the road are blacker than the soil of 9, 14 and 17. Those three tracts are identically the same to work.

I have worked some of the soil in the Umpqua Valley known as black sticky soil or black mud. I never have worked any on these lots unless it is a little piece right down next to the house. I can't give the number of the lot, but it is none of the lots in question; is a long way from either one of them. I would not say there isn't a small place of that kind of black mud pretty well to the county road on 19; there may be half or quarter of an acre that is black mud; in crossing it I

(Testimony of Walter Adair.)

should say it was as wide as this room. I have crossed it with a disk and I took it to be that. It is a very small place, but if that would be plowed up once deep enough, I don't know that it would be different.

I shipped some Alberta peaches off my fruit land this year; it was not a very heavy crop but the peaches were very nice. I have never considered this land specially peach land since the first year.

I have plowed my land each year and then had it disked several times, harrowed, and dug around the trees with a shovel I think almost every year.

EXAMINATION BY THE COURT.

My trees were planted in 1910. We bought in August, 1909, and they were planted the next winter and spring, 1910; that would be January and February. I have nearly always every year dug around the trees with a shovel for probably a foot in circumference. They have been pruned each year.

DIRECT EXAMINATION CONTINUED.

The land on 17 and 9 is practically the same. 18 and 19 the first year outgrew mine; whether it was in the quality of the tree that was put out I don't know. I don't know when these three lots in question were put out to trees, only that it was sometime in February or March of that winter. I wasn't over at Wilbur at the time. They were planted somewhere near about the time mine were.

(Testimony of Walter Adair.)

That year and the next the cultivation on 18 and 19 was good and the trees looked very nice. I only know that they were disked; the ground between the tree rows was planted with hay and they worked up and down the trees about $5\frac{1}{2}$ feet on each side of the tree with a disk and cultivator. I couldn't tell how often this was done during the season, but a number of times.

Eighteen and 19 were planted along about February, 1910.

Court: The contracts were made in March.

A. Then I am mistaken, I wasn't there.

Court: And 17 wasn't planted until the following year?

A. Not until the following year.

Court: That is my understanding.

DIRECT EXAMINATION CONTINUED.

The last time I was over lots 17, 18 and 19 was in the latter part of August of this year and picked my peaches. It was all grown up to weeds then and the trees hadn't been pruned; the leaves were pretty much all off the trees, which I accounted for by the grasshoppers in the tall grass. I don't know how many were dead trees; I know I was surprised and made the remark it was a wonder to me there were not more dead; a great many of them were alive and looked thrifty down at the root for not being pruned for two years.

I knew how land was selling in Douglas County in 1909 and 1910 and consider \$200 an acre for the bare

(Testimony of Walter Adair.)

land a fair price; they were asking more for some of the land. Now, irrespective of the trees, I presume land right close to town that way would bring \$100 to \$150 per acre.

Wilbur has probably 25 or 30 houses, a couple of stores, a blacksmith shop, a church, a schoolhouse and a depot. Also station of the Southern Pacific. The lower end of this land, out by the road must be close to half a mile from the depot.

We paid \$23,000.00 for this land or \$50 per acre for it all. From the price we got for 118 or 120 acres, it was worth \$5.00 an acre, and we thought we sold it fairly well, and some more of it at \$30.00.

EXAMINATION BY THE COURT.

There were 461 acres in the tract; something like 118 or 120 acres hill land that we sold at \$5.00 per acre.

DIRECT EXAMINATION CONTINUED.

If there had been any rocks on 17 I know I would have found them in driving across it; I know there is no rock on it. (I never dug down under in the soil there, only at one corner of it at the ditch. The depth is practically the same only it gets a little lighter; I should say it was 10 or 12 feet deep, and over at the edge on the other side it is deeper than that, that I can see.

The water penetrates this soil and goes off after a

(Testimony of Walter Adair.)

rain. There can't be anything there like hard pan or joint clay because the water soaks down after a rain.

I know there were some stumps over in the corner on lot 17, but I couldn't say whether there was half an acre, or an acre.

Q. Did you ever observe how many trees, if any, were omitted on account of this little tract not being cleared?

A. If I remembered rightly the trees were all put in.

I also owned a tract in Garden Valley and in the year 1911-1912 I practically took care of both tracts myself.

The best tracts, or my best trees on the Wilbur tract exceeded the best growth on the best trees of the Garden Valley tract by something like $2\frac{1}{2}$ inches. I was keeping track of the best to see which was the best land. The Garden Valley soil is a bottom sandy soil; river bottom, we call it there.

CROSS EXAMINATION.

The black muddy soil on 19 is down on the ditch, and I don't say that it is on 19; it is along that ditch there at 19 or 20, right in that neighborhood, and is a little spot that I took to be heavier than the rest.

Lot 9 is a little higher than lot 14, and lot 8 higher yet than 9. Beyond 8 it does not go into a hill, but there is a creek there on the east slope.

At the time we purchased this land we intended Mr.

(Testimony of W. E. St. John.)

Harding to plat it and sell it. W. C. Harding called our attention to it and first suggested it; he said he would plat it and could sell it for us.

W. E. ST. JOHN

A witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION.

I have lived at Sutherlin, Oregon, for five years; I am in the real estate business and am living on and developing an orchard tract of my own and some for others, which business I have been engaged in since my residence there. Sutherlin is about 4½ miles from the tract in controversy, which I am acquainted with.

I was formerly associated with the Luse Company which was formerly known as the Sutherlin Land & Water Company. This company have somewhere between three and four thousand acres platted and planted in Sutherlin Valley to orchards.

I am familiar with the expense of planting and caring for orchards in that vicinity. One day last week I inspected lots 17, 18 and 19 of Plat D. I am familiar in a general way with the soil of the Sutherlin Valley that has been planted so largely. It is practically the same soil as that in lots 18, 17 and 19. The land is all on the same creek or water stream.

I am familiar with the land in the Umpqua Valley

(Testimony of W. E. St. John.)

commonly known as black mud. The land in controversy is not of that nature.

We are selling similar lands, same character and situated practically the same from \$350 to \$500 an acre. That did not include the planting and care of the orchard. We charge \$35.00 an acre the first year for planting and \$12.50 per acre each year after that; that is, prepare the land, furnish the trees and plant them for \$35.00 an acre, and \$12.50 for taking care of it the first year. An ordinary charge in that vicinity for caring for an orchard the second year would be \$20.00 per acre.

Upon my visit to these lots in controversy a few days ago, I found apple and peach trees growing. There was fruit on a few of the peach trees.

Tracts 19 and 12, 18 and 13 and 17 and 14 are very similar; they have a gradual slope down in that direction.

The 400 acres that the Sutherlin Company has planted have made an excellent growth on very similar soil; they are almost in perfect condition.

Q. Now, you may state what the fact is about the market for fruit lands changing since 1910, or say 1912?

A. Well, we are selling, but there has been a market change.

It isn't a case of the price having depreciated so much, but just a question of not being able to turn the lands. 1910, of course, we all know, as a very prosperous year in all lines of business. Since then all dropped off and hasn't been for the last year any business to speak of, practically speaking. We commenced to

(Testimony of W. C. Harding.)

notice the change along the latter part of 1910; 1910 was good with us up until the winter time; we noticed it dropping just a trifle; 1911 held just about the same as the close of 1910, and in 1912 and 1913 dropped off just a trifle, but in the latter part of 1913 and 1914 we have done practically nothing.

W. C. HARDING

A witness on behalf of defendants, testified as follows:

I am 51 years old and the president of the W. C. Harding Land Company. I have resided at Roseburg for about 6½ years. I have been selling fruit lands—planting them and caring for them and general real estate business as well. During that time our company has platted and planted in the neighborhood of 2500 acres.

The tracts in controversy were sold by Mr. Kendall in the spring of 1910 (I believe. 18 and 19 were planted that year, I believe, or that spring, in March, and the other, lot 17 was planted the following year. There was some clearing to be done on it and we didn't get at it that year. Mr. Fred Green had the management of these tracts.

I believe Mr. Kendall saw this land before he sold it; he went to Roseburg for that purpose from the Portland office. Mr. Wallace attended to the planting in the main on Plat D in particular—the secretary of the company.

(Testimony of W. C. Harding.)

The tracts in controversy were planted by Mr. Green who was directed by an orchardist he got who had experience in California. After his planting was done that spring we furnished him a Mr. Phillips who came to us with splendid recommendations as an orchardist from Colorado, in and about Grand Junction, and he worked with and for Mr. Green that year. The trees were sprayed and pruned and generally cared for under his directions and was thoroughly done the first year, I know. I gave a good deal of more or less personal attention to it and was in and about the tracts quite often. I talked with Phillips about what the trees needed and the general care they were receiving. I don't remember much about the next year except this: I was up there in the fall of 1911 and at that time they looked good. During the spring of 1912 we had another man who I consider personally one of the best orchard men I ever had in Douglas County; a Mr. Geo. Wright, with a vast amount of experience and knowledge as well, who was on this tract and did the pruning and the spraying. I am speaking in general of that tract. I don't know about these three tracts any more than any of the rest of this entire Plat D, that we were caring for. He was there for probably three months, up in this general Plat D, with from one to two assistants all of that time, pruning and replanting in some instances, to my certain knowledge, whitewashing the trees. In other words, our directions to him were to do everything in his power to build an orchard. We know we had to turn them over to the ultimate owners that fall and winter.

(Testimony of W. C. Harding.)

I know the trees were replanted with every care in the world with good stock and that they were properly pruned and, as I said before, in many instances white-washed.

EXAMINATION BY THE COURT.

That was in 1912 the last year we had them in charge. They were cultivated and cared for properly during the years 1910, 1911 and Mr. Wright's care there in 1912. The expert care that was necessary to give the trees at that time so far as the replacing with perfect stock on the tracts, and what care they needed as far as pruning, because at that time the trees were coming three years old, and the older the tree gets the more care should be directed possibly to the cutting of the limbs. It is during that summer, that was 1912, during that summer, Mr. Green gave the tracts good average care. I am speaking now of the general care in Plat D and I saw them during that summer or fall repeatedly.

DIRECT EXAMINATION CONTINUED.

I am satisfied we had a good average orchard the first of October, 1912.

The next year in the fall, we had such an orchard ready and in proper shape to deliver to Mrs. Peterson except the replanting of the pear trees which we had promised her and didn't place during that winter, for the reason that this suit started during the planting sea-

(Testimony of W. C. Harding.)

son of this year and we didn't care to go ahead at our own expense, when we didn't know what the outcome was to be, as far as she was concerned.

At the time we planted these tracts, we did not know that they were not adapted to the growing of peaches and apparently no one else in the Umpqua Valley did. It was an experiment on the soil of that country, with the exception of the sandy river bottom lands, principally on the edges of the river. The peaches were planted as fillers. This was done to give a little income prior to the third or fourth year, or while waiting for the apple trees to come to bearing.

Ordinarily an apple orchard is supposed to be in full bearing at seven years, but very seldom is.

I never at any time authorized or directed any of my agents to discourage any of our prospective purchasers from personally examining the land offered for sale. In fact virtually everything in Garden Valley was sold after a personal inspection of it. There were a few tracts that were sold by correspondence, but I presume between 80 and 90 per cent were sold only after a personal inspection had been had of the land, and in every instance, we urged a personal inspection if it could be had.

I remember Mr. Hart being in Roseburg in January, 1911, but remember more about his being in the Portland office; I spent about half my time in Portland, dividing the time between Portland and Roseburg. I don't remember that I had a conversation with him about this tract at that time.

(Testimony of W. C. Harding.)

I remember Mr. Hart visiting the tract again in February, 1912. He was at Roseburg and we had a stockholders meeting of every stockholder of the Harding Land Company, that lasted about a week, and Mr. Hart was at Roseburg for a week or ten days and virtually everything of interest with regard to our orchard plantings both personal and from a company standpoint was discussed at that time. I didn't go to the land with him at that time that I remember. I don't remember any specific conversation that we had at that time excepting as I say the conversations in general.

I remember Mr. and Mrs. Hart's visit to Roseburg again in July, 1912. I do not think I visited their orchards with them at that time. I talked with them both while they were at Roseburg. We did not particularly discuss their own orchard tracts, only that they both expressed pleasure over the thought of quickly coming to the Umpqua Valley or Oregon, to live. I do not think either of them made any complaint to me at all about the condition of their orchard or the land on which it was planted at that time. I do not remember driving them to Garden Valley.

I heard the testimony of Mr. and Mrs. Hart to the effect that I promised at that time to sell the tracts near Wilbur and give them some land near Garden Valley. The fact is, I didn't make any such promise. Mr. Hart was our sales agent at that time. Our Roseburg office made very little effort in attempting to sell land. I personally made practically none. Furthermore, I couldn't have promised anything at Garden Valley be-

(Testimony of W. C. Harding.)

cause everything at Garden Valley had been sold for nearly three years, with the exception of the hills and some few tag ends that weren't worth while.

I heard the testimony of Mrs. Peterson about her visit to her tract, No. 17; she was not pleased with her orchard and said she looked for larger trees. I remember one statement she made that it didn't look as large as an orchard that her father at one time planted back east, but I suggested that possibly orchard methods might have changed in the last few years, and the question of pruning, and things of that kind, might have changed decidedly since that orchard back East was planted. We agreed with Mrs. Peterson to plant pear trees in place of the peach trees; in fact, give her a full planted pear orchard as well as apple orchard, with the suggestion that in the course of a number of years she could then make a choice between pears and apples. She and Mr. Peterson both assented to this. We gave her a letter which Mr. Hinckley who was then secretary of the Harding Land Company, and myself as president, both believed would act as a supplemental contract.

I did not visit Mrs. Peterson's land with her. I didn't at that time know the exact boundaries of her lot and the condition as to whether it was all cleared. I relied largely on her statements and that of her husband. They claimed that there was a good deal of unplanted land; in fact, quite a little uncleared land on the lot. I did not familiarize myself with this particular tract of land before it was offered for sale or planted to fruit. I relied upon the men whom we had caring

(Testimony of W. C. Harding.)

for the lands, and upon those gentlemen who acted as our experts in planting the trees and caring for them.

I understand that the land in controversy is referred to but I say that is the general habit of the Harding Land Company. These tracts in controversy we had Mr. Green plant, or under the direction of an orchard guide; in fact all three of them and all the plantings on the plat.

I don't remember that we had this investigated and passed on by experts before it was put on the market for sale, or that we sent off and got experts to come down there and testify as to the value of this land for orchard purposes. In the first place, I had ten years orchard experience myself in my younger days, and I thought I knew something about soils. In the second place, we took the judgment of men who had lived in the Umpqua Valley a number of years in virtually every purchase we made. In other words, were trying to get the best from the very start in our various plantings or those tracts that we considered adapted to the planting of orchards.

I do not think I stated to Mr. Kimball or Mr. Lundburg that these orchards had been neglected because they had not been neglected. I did not admit, or state to either of the gentlemen or to the plaintiff or her assignors that the land ought never to have been planted to fruit trees. Mr. Lundburg brought Mr. Kimball and upon visiting that tract I made the statement in regard to this probably twenty five or thirty acres along the railroad in this plat C at Dady, that it should have never

(Testimony of W. C. Harding.)

been planted to orchard. I remember that distinctly because it never had. We made an adjustment of that claim afterwards. We bought, or took the land back, but I never made this statement about these lands.

I know of no reason why the land in Plat D and particularly these three tracts in controversy should not have been planted to orchards.

Tracts in that plat have made an average growth I think, beyond question. I speak now of the apple trees because the peach trees did not do well.

We entered into a contract with Mr. and Mrs. Hart to replant their several tracts in pears. That is it was agreed to by Mr. Hart and I don't think Mrs. Hart had anything to do with that; I think that was the spring of 1910—I don't remember whether that was 1911—I would say 1911 undoubtedly—that was determined on. At any rate the pear trees were there when I saw the tract with Mr. Lundburg and Mr. Kimball in 1912. The pear trees had been planted where the peach trees had died out on the Hart tracts, 18 and 19.

The pear trees were planted at Mr. Hart's suggestion; it was a mutual agreement and Mrs. Hart did not make any objection to it.

I never said to Mr. Hart that God never intended that land for orchard land.

Mr. Hart after his election to the legislature, came to Oregon sometime the latter part of December, 1912. At that time I called his attention to the fact that our stewardship had virtually ceased and it would be up to him to care for his tract the next year. We had a

(Testimony of W. C. Harding.)

former discussion about this matter back in Dakota when I was there in September, 1912, and Mr. Hart authorized Mr. Hinckley and myself, as his agent, to go into contract with Mr. Cavalho. We suggested one of three men, Mr. Green, who had cared for the tract, Mr. Gray, who lives on one of the tracts down there and Mr. Covalho, and Mr. Hart chose Mr. Covalho, at possibly our suggestion. Covalho needed the work and was doing as good work as anyone. So he authorized us as his agent to go into contract with Covalho for the care of these tracts for 1913. I will explain another thing and I know of possibly one other company that follows the same rule, the Edenbower Orchard Company, that when October 1st comes, the season ends. By what rule we have that, I don't know, except that has been our custom six years and all our tracts have been turned over to the owners after October 1st of each year. Cultivation usually ceased about the first of August.

We entered into the contract with Mr. Covalho for Mr. Hart and he had charge of the orchards from that time on. This arrangement was not made because we were short of funds. It was because our time for caring for his orchard has expired. Mr. Hart claimed that a literal interpretation of his contract would place the time of our stewardship during March sometime, 1913, but we went into contract with Mr. Covalho during the early part of January of that winter, 1912, 1913.

I do not know how much of lot 17 was not cleared in May, 1913, as I was not there at that time. I have

(Testimony of W. C. Harding.)

not been over that lot frequently; I was over it a week or ten days ago. There is a clump of brush on part of the lot, possibly 50 feet square, I should think, and other than that I didn't see anything but what was in good shape. One of the photographs introduced here shows a large tree fallen; I think that is on one corner of the lot, right close to the edge of 17. It must be the northeast corner towards Deady. That clump of trees doesn't occupy as much space as in this room. There were no rocks or boulders on 17 that I noticed or saw.

The main conversation I had with Mr. Hart as to his getting further time on his payments was back at Deadwood, South Dakota, in September, 1912, at the time I was there for a week or ten days. Mr. Hart was very much worried because Mr. Eddy insisted on payment, Mr. Eddy being trustee as between the land owners and the lot owners; that is the original land owners—the Harding Land Company and the purchasers.

EXAMINATION BY THE COURT.

That is Mr. Adair and his associates; in fact I had a conversation prior to this because Mr. Hart upon his spring visit, or upon one of his visits to Roseburg wouldn't go and see Mr. Eddy because he didn't want to tell him at that time that he was short of funds. Mr. Hart said that until they sold their news stand, they didn't have the money to pay Mr. Eddy and suggested

(Testimony of W. C. Harding.)

that I get Mr. Eddy to give him a deed and mortgage to these tracts. In other words to deed the land to the Harts and take a mortgage back.

DIRECT EXAMINATION CONTINUED.

And if that couldn't be done, he suggested that I take some of my personal contracts and trade to Mr. Eddy for these; he knew I had personal contract, and take them over and trade to Mr. Eddy and make it a personal matter between himself and myself. I told him I would use my best efforts when I got to Roseburg and I did.

I don't remember that Mr. Hart ever made any complaint to me about his orchard or the condition in which he found it, during all of these conversations I had with him. I first knew Mr. and Mrs. Hart were dissatisfied when suit was threatened in 1913, the summer or spring. Mr. Hart was then represented by the same attorney who now represents him.

CROSS EXAMINATION.

I can't remember *now* it came about that I selected this Rice & Rice ranch as an orchard in the first place. I was the agent who sold the tract to these Colorado people in the first place. Rice got \$50 per acre. The contract that was introduced in evidence has something in regard to \$10,000 that was to go to the owners. I believe the Colorado gentlemen paid Rice & Rice \$10,000

(Testimony of W. C. Harding.)

cash, and they were to have that back first before any other of the money was disbursed. That is usually the custom in real estate transactions, that if a man puts up the money to buy the land he gets that back before a division of the profits is had.

I believe when Walter, Adair, Epperly and these other gentlemen purchased this Rice & Rice ranch, they paid Rice & Rice \$10,000. I got 5 per cent commission on that. That was based on \$50 for 461 acres, whatever that comes to, we got 5 per cent commission on that.

Q. It speaks here of a \$10,000 item and a \$13,061.00 item.

A. We received a 5 per cent commission on the total purchase price.

If these people purchased the Rice & Rice ranch, we proposed subdividing it and selling it as orchard land, which they understood. It was the suggestion prior to the time that they purchased that it was to be planted where the owner desired.

The original contract between Adair, Epperly, Burns, Green and the Harding Land Company, dated July, 1909, was dictated by me to Mr. Hinckley. I haven't read it for some years but would be familiar with its provisions if I should look it over.

At the time of the purchase of the Rice & Rice ranch, the intention on the part of the Colorado bunch and myself was to plat this and sell it as orchard land. Prior to the time of purchase I didn't have a physical examination made of the soils of the tract, except this: Before we bought the tract we discussed the matter with

(Testimony of W. C. Harding.)

different people at Roseburg, notably with Napoleon Rice and his father. The young men were born and raised in the country and had known the tract from their youth. My associates and myself made no physical examination from an expert standpoint.

About the second fall, the fall of 1910, we had a ditch made by a Mr. Caufield who was an engineer from Eastern Oregon, who was then in our employ. Mr. Green reported want of drainage and we had him employed on the tract and on our Plat C, still north of this a couple of miles, six weeks, making main drainage ditches in these two tracts and the exact points where they begin and end, I can't give you. It was done under Mr. Wallace's direction and he can say when he comes on the stand, and so can Mr. Green; the intent was to cut the water off the hill entirely and keep it from spreading over the land in general.

That ditch was constructed along that county road.

I believe there is a little hump or knoll on the south-westerly corner of lot 19, along the road. It would continue back on lot 40.

Q. From that point going northwesterly along the county road, the fall or drainage would be towards this gate?

A. I don't know about that, because this is rather abrupt, as I remember it. I can't give you the exact runs, but this is rather abrupt and then falls quite quickly into what I would consider one of the low parts of this lot 19.

Q. Let me ask you; we take it for granted a drain-

(Testimony of W. C. Harding.)

age ditch along this county road from 4 down to the corner, the northwest corner of 19; now, does this drainage ditch run over this knoll?

A. I don't know; no, it wouldn't naturally run over much of a knoll.

I can't tell you how it gets into this tract, or how it gets out of the tract. I have been along the county road near this knoll about the center of the westerly edge of 19 a great many times. There is a spring from 40 or 41; there are several springs through here.

Q. Is it north or south of this knoll we speak of?

A. I can't tell whether 40 or 41; where that springy ground is.

Q. Do you know of a wet place along the northerly edge of lot 19, where some seepage from the hill?

A. Yes, I know at the bottom of this little knoll here it is wetter naturally than it is right here on the knoll.

I never noticed particularly the kind of grasses that grow in the lower places if you have reference to rushes.

Q. No, I have no reference to rushes. You know in the lower places where it is damp, there is a darker green grass and it is a little bit taller than other places. Does the grass grow taller?

A. No there isn't any of that to any appreciable extent on that lot.

Q. Does it grow any more thickly on this knoll along 19 in this wet place you spoke of?

A. I don't think there is anything there to hurt that lot, sir.

(Testimony of W. C. Harding.)

Q. I am not asking that, I am asking if the grass grows tall there?

A. It is as high as my shoulder and grown all over 18, 19 and 17 today; I don't think any thicker at this spot than any other.

I have walked over that part of 19 and got my feet wet, in the winters of 1911 and 1912; I don't remember of getting them wet there in May; don't remember whether I was up there.

I am very sure about the drainage of lot 4. This ditch along the county road was constructed. I am not certain it didn't go past 19. I am certain it did not go over the knoll, I think the knoll is on this corner; I think it is a continuous knoll that the road goes over.

I think I have made a personal physical examination of parts of the soil on Plat D since we acquired the property. At different times I have been over the tracts with Mr. Green, our care taker and with other people, and we have made physical examinations of it. Right recently we made a rather careful physical examination of it, within the last ten days. We also made physical examinations prior to the last ten days, such as a man would give to any soil that he intended to plant to apples, or give an orchard planting to.

At the time we took over Plat D and placed it on the market, we did not put any drainage ditches over it, that I remember of except this main drainage ditch on that place, there for the purpose of cutting away the hills; when Mr. Green first took this tract of land, the

(Testimony of W. C. Harding.)

first year he had it, he didn't know what it needed with regard to drainage; that winter he found out.

Q. But the water does come down off the hill here, and if that ran down onto the land, what effect would it have on the land?

A. It would make it wet of course.

Q. Now, prior to the time this drainage ditch was put along this county road, the westerly side of the tracts in controversy, and also west of lots 4 and 11, prior to that time the water drained off the hills down on to this bottom land, didn't it?

A. No, I wouldn't say that. The road itself was naturally higher, just the water from going across on this tract and pulled the most of it out here, anyhow.

Owing to the fact that the road was built higher than the adjacent land, before we built this drainage ditch, threw most of the water along the road; it couldn't very well get by the knoll. I couldn't tell just where it did go. It naturally didn't stay on the lot; it probably ran down on this lower land.

Q. Now, I will ask you Mr. Harding, you take the land laying along what they call Swale Creek here, for a long, long time, and the water draining off the hill and standing on that low land there, what effect would that have on a clay soil?

A. Mr. Lundburg, that water never——

Q. I am not asking you whether it did or not; I am asking you if it did that.

A. No it didn't stand on the land.

Q. What effect would it have on a clay soil.

(Testimony of W. C. Harding.)

A. Why, it would make it sour, of course; absolutely sour.

If you had land covered with water any great length of time it would either kill the grass completely, as I have seen it do or there would be swamp grass growth, or a rush grass growth. If it ran on the clay year after year, it would give it the appearance of the white lands in the Willamette Valley. I should think it would have the effect of being deleterious to plant growth.

I may not understand just what effect it would have on the root growth. I am not scientific enough to give a scientific explanation of these things. I simply say that in my judgment, it would be bad for the root growth.

On the westerly side of this tract the hills come as you see the deviations of this line; on the southerly part of the plat the hill comes nearer the county road and the swale portion of this land, and then recede and go northerly. On the other side there are hills right to Wilbur and the general range of hills is tortuous, winds in and out.

Q. Where is the valley the narrowest?

A. I should say right here, that is the constriction.

Q. Speaking of this Sutherlin Valley here, and this narrow place near Wilbur, where the hills come down close; now, freshets of water come; what would be the effect on the Sutherlin Creek when the waters come down, could it take care of it?

A. I have lived here 6½ years; I have passed this tract ever since they have had it every winter, and I

(Testimony of W. C. Harding.)

try to be out there when there was any indication of a freshet condition, and I have never seen any overflow except this so called tail end of what is called Swale Creek in this valley.

That is in 30, possibly 29; about that general region down there.

The southerly end of this tract is right close to Wilbur. The store is right down there two or three hundred yards.

I wouldn't say there was an overflow land down in this part; never saw it overflowed in my life.

This creek was never called Swale Creek; this was called the swale part of this tract; I am pointing to the lower end of Sutherlin Creek.

Mr. L. M. Caufield dug the drainage ditches; and claimed to be an expert in that line. We thought he knew his business at the time.

I didn't say that Plat D did not require drainage. I think that every valley in the Umpqua Valley requires drainage, owing to the fact that the hills shed the water down on the leveler land and it should be carried off in the proper direction. That is our experience in all of our plantings.

I have always considered the soil in Plat D a clayish loam. I don't know what clay is made of. It has a fine texture. I know of clay that I wouldn't call clay loam; a black mud is supposed to be a blue clay; that is one of the geological explanations of our black mud. I wouldn't call that a clay loam, by any manner of means. I wouldn't call adobe a clay loam, such as we have in

(Testimony of W. C. Harding.)

New Mexico, or through there; that is true adobe; it is a clay though, just the same. I can't give you an explanation of the word adobe, only I know it when I see it. It is a soil that bakes like a brick and cracks wide open and is virtually impervious to water. After adobe land has been wet and then permitted to stand, and plowed when it was dried out, it would turn up in great cakes.

I have examined below the surface soil in plat D on 17, 18 and 19 within the last ten days for blue clay. I wouldn't say there wasn't any dense, heavy clay sub-soil in tract 19, but that there was none in that part I examined.

Four of us made an examination by digging probably two feet to thirty inches deep fairly close to the center of lot 19. The soil there was pretty much like the top only with a gradual change you would expect to find that far down, that hadn't been cultivated possibly forever. Soil, however, all the way down. In my judgment it was more compact than the top soil, naturally and would naturally be denser. It was clay loam, not clay. That is what it is called in the Umpqua Valley and is a local expression.

This heavy clay is a denser clay, but I do not know whether on account of being water logged, the character of the soil, or what it is, but it is an extremely dense rubbery kind of soil, entirely different. Anyone would know it in a minute on seeing or handling it—even a child.

Plaintiff's Exhibit H is a publication issued by the

(Testimony of W. C. Harding.)

Harding Land Company and gotten out under its direction. I think the statements and representations made therein are reliable.

Plaintiff's exhibit I is a publication issued under the direction and authority of my company and we considered the statements made therein, with reference to the company and its plan and operation, dependable and reliable.

These pamphlets were given to our agents for distribution for the purpose of attracting investors.

Our idea when we platted Tract D and these other tracts was to get people to buy a ten acre tract or more, so that they could live on it and earn a living, or else have it cared for in later years by our company, or by individuals, as they might choose. We selected all these tracts with that in view.

Q. I hand you plaintiff's exhibit H, and pointing to a picture contained in the same where it says "Young peach trees (early Crawfords). We plant peaches between the rows of apple trees as peaches yield in their third years, and never fail in the Umpqua Valley." Is that a three year old tree?

A. I don't know whether it is a three year old tree or not. I have seen them as large, or larger than that, the third year.

Peach trees begin to bear about the third year.

The statement was made that one would get three boxes of peaches off of a peach tree the third year in the Umpqua Valley and we have Mr. A. L. Kitchen as authority, who was for five years manager of the

(Testimony of W. C. Harding.)

Ashland Association. He is authority for the statement that from two to three 20 pound boxes from three year old trees, was customary in the main.

Q. Were the statements true, as made in that circular or folder there, and did you make them for the purpose of having people rely on the truth of it, that after three years if anyone purchased one of your tracts in which you planted Newtown Pippin and Spitzenburg apples, with peach tree fillers, the income from the peaches would be sufficient to pay the balance of the purchase price on the orchard as required?

A. That was our honest opinion at that time, yes.

I don't know why the peaches didn't grow on 17, 18 and 19 but the soil didn't seem to be adapted *ot* it; it seemed to be of too fine a texture for them. There wasn't enough grit and sand in the soil.

Our experience for the past number of years now is that the peach trees in the Umpqua Valley that do absolutely the best are on the sandiest river bottom loam. When you get the soil of too fine a texture the peach roots do not seem to do well in it and die out.

We proposed to change the peach trees to pears because we were advised that a pear tree would do better, and made the ultimate owner much more money. We thought the pear trees would grow better there, because we were so advised. I can't tell the habits of a tree all together, except this; that a pear tree seems to do better on a finer testure soil than a peach tree. This is the only reason we had for changing. This whole matter was an experiment there in the Umpqua Valley; no

(Testimony of W. C. Harding.)

one seemed to know and we tried peach trees on our various soils, and when they didn't grow we replaced them with pear trees which we were advised would do well.

I think it is true that a pear tree will grow better in a wet soil than a peach tree.

Q. Isn't that the reason why you wanted to plant pear trees on these tracts instead; due to the failure of the peach trees to grow because it was a wet clay soil and the pear trees would grow better?

A. No, I wouldn't say that. I said because of the character of the soil the peach trees died and didn't do well. We had to place something that would grow there.

Q. The matter of moisture had nothing to do with it?

A. I didn't say that, I don't know.

The Peterson tract was planted during the 1910 and 1911 planting. I think that we discovered the peach trees were dying on tract 17 in the later spring of 1912. I don't know what caused it; I only know a good many of them died.

I don't remember the curly leaf on the trees in 18 and 19 in 1913 so much because there were more dead peach trees and more pear trees left. The general impression then was that the peach trees in the main had been removed from 18 and 19, and more pear planting had grown on 17 if I remember correctly than upon plat C. I don't recall about the peach trees on 17, 18 and 19 having curly leaf because there were very few left.

(Testimony of W. C. Harding.)

The Peterson tract was planted during the planting season of 1911; the first growing season on tract 17, then was 1911 and the second 1912; the third 1913 at the time Mr. Kimball and I were out there. Peach trees must have died on 17 the first year; I don't know when they died, but I know they were dead and had been replanted with pears. I noticed when Mr. Kimball and Mr. Lundberg were there with me that the peach trees would have to be replanted to pear trees, in order to give them a square deal. That was in June 1913, I think.

There weren't any peach trees to speak of on 18 and 19; they practically had been replanted to pear trees. The planting was done under the direction of Mr. Geo. Wright and Green as managers; I can't tell you who did the actual work. The pear planting was done in the spring of 1912 because that Fall we turned the tracts over to the Harts, or were supposed to.

I do not know whether or not Mrs. Peterson was ever notified that the peach trees on tract 17 were dying and were not successful and ought to be planted to pears. I never consulted Mrs. Peterson about putting pear trees on there because I never met the lady until she came last year. I knew her address, but don't remember whether or not I ever communicated with her as to the condition of her orchard.

I can't tell you when the pear trees were planted on 18 and 19; the complete planting was done in 1912; that is all I can tell you. I don't say all the peach trees were taken out; I think they were not all taken out but

(Testimony of W. C. Harding.)

I say all the dead trees that were found on the entire Plat D with special reference to 18 and 19 were replaced with living trees by Mr. George Wright and associates in the spring of 1912.

1913 would be the third year of Mrs. Peterson's cultivation and we had to take care of it during that season. I think it is true that the first time I ever talked to Mrs. Peterson about her tract and the first time she ever saw it to know the condition of it was the time she went out there and afterward came back to our office and we tried to square with her the condition of the tract generally and the question of the peach trees.

The orchard as it existed on tract 17 the time I was out was not the kind of orchard called for in the contract on account of the dead peach trees, which would have to be made right. Technically we could have replanted those tracts to peach trees and forced the owner to have taken them, because of the technical wording of our contract, but that wasn't the thought or desire in our minds. Our desire was to give these people, all of our purchasers, in fact, something that would make them money and do well with them, and our suggestion was that they have the pear plantings.

I took Mr. Lundburg and Mr. Kimball out to these tracts and think Mr. Lundburg advised us that neither Mrs. Hart or Mrs. Peterson would pay another dollar on those contracts, or advised us that he would advise them not to pay any more. I do not remember the reasons he gave or the substance of the conversation at all. I guess we talked about the soil. I don't recall saying

(Testimony of W. C. Harding.)

to Mr. Lundburg or Mr. Kimball in his presence that that tract was not adapted to the growing of fruit trees, because I don't believe it today; I think it is absolutely adapted to the culture of apple and pear trees.

I do remember saying to Mr. Lundburg in Mr. Kimball's presence that I thought the Harts and Mrs. Peterson had gotten a raw deal and that I felt sorry for them; I have been consistent from the very start to the finish, that Mr. and Mrs. Hart never had any contention, but I did admit that there should be an adjustment, possibly of Mrs. Peterson's tract. I make the distinction because the Hart tracts had virtually all been planted and replanted to pears and turned over to them in the Fall of 1912, whereas there was this clearing that was spoken of, and at the time when we were out there, Mr. Kimball, Mr. Lundburg and myself, I thought lot 17 went on the other side of this draw and was cut for the ditch but have found since by cornering that it is not.

Q. I still don't grasp just what you are getting at in regard to the Harts. What difference is there as to the condition of tracts 17, 18 and 19?

Court: I understand he has testified a good many times that he claims he has complied with his contract with the Harts, and turned the tract over to them in the Fall of 1913.

A. We are willing to meet Mr. Lundburg as representing Mrs. Peterson.

Court: I am talking about Hart.

A. On the adjustment of her claim, but not the Hart, because we claim we had fulfilled our contract.

(Testimony of W. C. Harding.)

Court: That is what I understood all the time.

I understood that in June, 1913, that Mr. Lundburg had advised the Harts the condition of things down there, because I thought he was hunting a law suit.

It is true that Mr. Lundburg has attempted to secure an adjustment out of court on his own terms, which as I remember was to take this land back at \$50 an acre, and pay these people back their money, or the difference.

RE-DIRECT EXAMINATION.

I don't know that our company has planted peaches as fillers in any of our plats where they were successful and measured up to the representations of the pamphlet, but there are peach plantings in the valley that I am satisfied do. At the time we planted we did not know that peach trees would not do well there. No one knew as far as I know. We planted them to give the purchaser an income from the third year and on until the apple trees came into bearing. I wouldn't say whether peach trees do well in the valley not far from this locality as I don't know of any peach orchards up there. I know of other places in the Umpqua Valley. We had no reason to believe at that time that peaches wouldn't do as well in the land in which we planted them as they did on other lands with which we were acquainted.

The Harding Land Company was in good financial condition at the time we entered into these contracts and at the time the pamphlets were printed. We were doing a flourishing business and selling a great deal of land,

(Testimony of W. C. Harding.)

both in large tracts and these small fractions. I think the cuts in Plaintiff's Exhibit I were taken from actual photographs and cut down from 8x10 which we have in our possession. I think I have seen them all.

Q. Now, you state in there about the Umpqua Valley being so well adapted to Newtowns and Spitzenburgs. Did you know at the time you issued this pamphlet of concrete examples of the growing and marketing of these varieties of apples in that valley?

A. Yes sir.

Q. I notice on page 15, of this pamphlet, in a concrete statement here of a cultivated orchard near Roseburg with a statement there that a half interest in this orchard of twenty acres was purchased in 1907 for \$2750.00; the new joint owner building a dryer for \$500.00, bought a team for \$300.00, total \$3550.00 on borrowed money at 8 per cent. "He paid the entire amount last Fall from Proceeds of orchard and had a near sum left." Did you know that?

A. That was a statement put out by the Roseburg Commercial Club, and we compiled it. It was from an orchard south of town in what is called the Winston District.

I knew the man who owned it—Mr. Baker, and he carried this out, vouched for it.

Q. Do you know anything about the yield of a Spitzenburg orchard in that immediate vicinity, owned by a man by the name of Smith, about that same time?

A. Mr. Smith had just a few trees; he had, I think, 30 trees and he measured his ground, and it came to a

(Testimony of W. C. Harding.)

quarter of acre; if I remember correctly it came to about \$600 for the year for those thirty trees. That was quite a number of years ago, four or five years ago.

That was about the same time as this other. There are such successful crops there today. Mr. Skinner last year told me that he got \$5000 from 12 acres, for the fruit, consisting of Spitzenburgs and Baldwins and Ben Davis.

In view of the concrete examples that I had personal knowledge of at the time this pamphlet was issued, I consider the statements made therein true.

I was present when Mr. Lundburg, of plaintiff's counsel, took the photographs that have been introduced in evidence here. He had a small camera with him and I believe he took all of them. I don't remember that Mr. Kimball assisted at all, and I remarked to Mr. Green at the time that we were certainly getting the worst of it; although I am not a practical photographer, I have been with Mr. Clark a great many times, our Roseburg Photographer, when taking hundreds of pictures of the Umpqua Valley, seeing his *modus operandi*. This gentleman held his camera down this way and waited until he got to some weak spot in the tract, apparently and flirited the thing around until he got his picture. That was his general method of taking his pictures.

I testified this morning in answer to some cross interrogatories that there were some two or three other parties who made some complaints about their tracts in Plat D, but I don't think any of these complaints were

(Testimony of J. T. Epperly.)

about the soil, or that it was not adapted to fruit growing.

Referring to the testimony given here in regard to swale, we get that clear down there to Wilbur among those old residents and call the lower end of Sutherlin Creek clear down to where it goes under the bridge, the swale; that is the general name of it. Sutherlin Creek is locally referred to as the swale.

Q. You don't know whether or not the pioneer name of that creek, from its beginning, way up near the Calipooia, was Sutherlin Swale or Camas Swale?

A. On the topographical map it is called Camas Swale.

I don't know the pioneer name for the creek, but it is now Sutherlin Valley, Camas Swale.

I am not positive about the cause for the failure of the peaches to prosper in Plat D, except I am under the impression that it is the nature of the soil in a large measure; climatic conditions are one and the same down there in that Umpqua Valley, very much.

(Excused.)

J. T. EPPERLY

A witness on behalf of the defendant, testified as follows:

I live in Douglas County, and am one of the defendants in this case, and one of the land owners referred to here.

Mr. Burns and myself, Mr. Carney, Mr. John Britton and Mr. Harding all went out to this land before I

(Testimony of J. T. Epperly.)

purchased; we went down across it and came to some ditches that were 7 or 8 feet deep. We examined the soil as best we could and I was pretty well satisfied with it, and didn't go over any more of it.

I have been a farmer all my life and am farming now west of Roseburg. We thought this land was worth \$200 for fruit growing purposes, and that it was good fruit land as far as I knew. The soil seemed to be pretty good down at the bottom of the ditches. The ditch we looked in was something like six or seven feet deep.

I am not very familiar with these particular lots in question here but have been over them; I was over them a week ago last Monday and made the best examination of their condition I could at that time and looked at the trees. Most of them were alive. The dead trees were mostly peach trees.

I am pretty well familiar with the kind of soil in the Umpqua Valley known as black mud, and didn't find any such soil as that on lots 17, 18 and 19 although I looked the best I could.

It was the intention of the land owners from the beginning that the cultivation contracts of the Harding Land Company should be entirely their own affair and separate from the land sale.

When I looked over lot 17, 18 and 19 the other day I found some oats, cheat, vetch, timothy and some red clover making what I would call a rank growth and it looked as though the soil must be pretty rich or it wouldn't grow so large.

(Testimony of J. D. Zurcher.)

We have had an unusually dry season in that locality during the past summer.

I purchased this land for fruit or growing purposes; I acted in good faith and believed that it was really valuable for that purpose. This was also the state of mind of my associates as far as I know. It never has been my intention to deceive anybody or cause anyone to be dissatisfied.

As far as I know, from what I have seen and observed of that land, and its history under cultivation it is first class fruit land; of course, I am no expert on orchard lands. I didn't see anything in connection with that soil to indicate that it is not first class land for apples and pears.

The market value of land now is not so high in that locality as compared with the market price of 1910.

J. D. ZURCHER

A witness on behalf of the defendant, testified as follows:

I have lived in Roseburg for seven years and am in the abstract business. I was formerly secretary of the Roseburg Commercial Club for one year.

In my business, we represented two firms who lend money on Douglas County property. It is part of my business to ascertain the value of lands offered as security.

I heard the testimony of Mr. Harding with reference to what is known as the Baker orchard. I prepared that

(Testimony of J. D. Zurcher.)

statement myself which was contained in the pamphlet, after conferring with Mr. Baker. I was secretary of the Roseburg Commercial Club at the time and I visited Mr. Baker's place south of Roseburg; he gave me the facts as stated therein, and I verified them by going to the bank where he borrowed the money and verified his statement that it was all true.

With reference to the statement being true or false with reference to the fruit possibilities of the Umpqua Valley it has been my observation that it is true, if a man will put the work in his orchard; that he can make money if he will work.

I have had occasion in a number of cases in connection with the Commercial Club work as well as money lending work, to know what has been done in the production of fruit there. The soil and climate of Douglas County is well adapted to the raising of fruit, commercial values.

I heard the statement read this morning by Mr. Lundburg from one of these pamphlets of the Harding Land Company which is in evidence as to some of the possibilities of Douglas County and would say that it is true.

I am well acquainted with an orchard lying out from Roseburg opposite the fair grounds which was referred to in the testimony of Mr. D. C. Pitzer here. The reason it has not been a success is because the bed rock is about six inches from the top of the ground. That is common knowledge in Roseburg; nearly everyone

(Testimony of J. D. Zurcher.)

there who knows anything about the orchard business at all knows it.

I have been over the lands referred to in this case, lots 18, 17 and 19, Plat D. I saw them last on Tuesday of this week. Mr. Green, Mr. Bradburn and Mr. Clark of Roseburg were also there. Mr. Clark is a photographer and took four views of these tracts while there. Mr. Clark has a good standing as a competent photographer. He appeared to be using an 8x10 view camera.

Q. I will show you now some pictures which are numbered 1, 2 and 4.

I recognize these four pictures as being views taken by Mr. Clark on, or in the immediate vicinity of these lots, 17, 18 and 19 and was present when they were taken. They are true representations of what they purport to represent as to the lot hereafter testified.

Said pictures offered in evidence, and marked as Defendant's exhibits 37, 38, 39 and 40.

Exhibit 37 represents a photograph of lot 14, Plat D, looking at it in almost a northerly direction. The camera was placed in the roadway between lots 14 and 17, on a tripod and I should judge it was about five feet in height.

Defendant's exhibit 40 represents a view of lots 18 and 19 plat D taken from a point in the middle of the road a little to the east of the line dividing 18 and 19 and 12 and 13. That is a line running northerly and southerly a little to the east of the four corners, which would be in the middle of the road there, looking almost

(Testimony of J. D. Zurcher.)

southerly; the corner stake is in the foreground of the lot right there, that is the corner between 18 and 19.

Defendant's exhibit 38 is a view taken from the same point that no. 1 was; it was taken from the same point as 37, looking in the opposite direction; that would be between 14 and 17, looking over 17; the camera was turned upon the tripod and pointed in exactly the opposite direction from the other one taken in that direction, but the tripod was not moved. Those trees are on 17.

Defendant's exhibit 39 represents a view of lot 17, taken from the same position as exhibit no. 40 only looking in the opposite direction, the tripod remaining in the same place and the camera turned right around on the tripod, looking the opposite direction; that is, looking in a southerly direction, almost south.

The trees that show in exhibit 38 are on lot 17. The trees shown in exhibit 39 are on lot 13.

I went over lots 17 and 18 at the time these pictures were taken and observed the surface, particularly of 17. I didn't see a rock on any of it, except in the creek that runs down through where there was some small gravel, probably as big around as a hen's egg.

I am acquainted with the market value of fruit lands in Douglas County as they are now and as they were in 1910, and I would say it was at least 50 per cent less today than it was in 1910.

I am familiar with the soil there in the valley known as black mud and saw no black mud any place on any of these lots which I visited.

(Testimony of F. S. Green.)

I am well acquainted with Mr. Hart and I met Mrs. Hart at the time she visited Roseburg in July, 1912. I talked with both Mr. and Mrs. Hart in the office of the Harding Land Company and I asked them, when there, how they liked Douglas County, or especially Mrs. Hart, because it was her first visit, and how they liked their investment, and she told me they were well satisfied. She said they had been out looking at their tract, and she was well pleased with it. She said the tract was over at Wilbur. Nothing was said about Mr. Hart's tract when talking with her. I had several occasions to talk with Mr. Hart about his investment there in Plat D and each time he told me it was fine and that he was coming there to live. I have seen him several times since then. I never knew before I heard of this suit in the newspapers that he had any complaint about his investment in Plat D.

CROSS EXAMINATION.

I didn't make a physical examination of tracts 17, 18 and 19 except to walk over it and have never made a physical examination of the soil on those tracts.

I have had business relations with the Harding Land Company in regard to abstracts.

F. S. GREEN

Called on behalf of the defendants, testified as follows:

I am one of the defendants and one of the land own-

(Testimony of F. S. Green.)

ers in this case. I have resided at Wilbur since August, 1909. I am living on part of the old Jack Chenoweth place.

I made no investigations as to the actual merits of this property for fruit growing purposes, before purchasing excepting to talk with people over the country. I satisfied myself that it was first class fruit land.

I have been a farmer all my life and am farming now.

My contract with the Harding Land Company was made with honest motives to put good meritorious fruit lands on the market, and I have never indulged in questionable schemes. I believe that I was putting on the market the very best kind of fruit land, and still believe that.

I planted and cultivated the lands in Tract D that were sold by the Harding Land Company; I plowed and planted and then cultivated them three years. 18 and 19 were planted at a different time from 17. 18 and 19 were planted in March, 1910. After the lots were planted, I disked and harrowed them every year which was the principal part of the cultivation. I aimed to go over them every ten days or two weeks during April, May, June and July. The first of August is the close of the cultivation season, in order to give the trees time to ripen up for winter weather. I have heard that if you cultivate later you will produce a tender growth of wood that will not survive the winter cold, but I have never had such experience. I would say that it is

(Testimony of F. S. Green.)

the custom of this country as I understand it to cease cultivation about August first.

These trees were also pruned and sprayed; the pruning was done any time after the first of January each year during the three years. I aim to spray before the bud starts in the spring. On 18 and 19 I didn't spray the first spring, that is, when just little switches were set out. I did after that. I considered the spraying such as good orchard management would require. We sprayed for scale with lime and sulphur which is the customary practice and according to good orchard practice in that locality.

My care for all these trees ceased in the fall of 1912. At that time the condition of the orchards were good. At that time the orchards contained a few peaches and quite a good many pears and two kinds of apples, Spitzenbergs and Newtowns. The original planting was two kinds of apples and the peach trees but the most of the peaches died on account of those orchards not being adapted to peach trees; I think they had proper care as far as my care was concerned. When the peaches died, most of them were replaced with pears; that is, the first year we replaced peaches, and when they commenced to die saw the peaches were not going to grow, so we replaced with pears.

In the fall of 1912, when I had finished with the three years' cultivation, the apples were practically all alive; there might have been what might be called two or three dead apple trees to the acre; I don't remember just what proportion of pears were planted, but I think

(Testimony of F. S. Green.)

between one half and two thirds pears planted in place of peaches.

As I stated before, the first peaches that died out, were replaced by pears; later on more peaches died, and more pears were planted, but that was so late the pears didn't make as good growth as the first planting. However, they grew and thrived.

At the end of three years' care I gave it, I would call it a good orchard; I have twenty acres there, and I don't see but what it is just as good as mine.

Tract 17 was planted in February, 1911. We could have planted this ground in the month of February, successfully; I don't find it too wet to work in January. I have worked on 17 in the month of January. We gave the trees on 17 the same care as we did the others, up to the fall of 1913. The trees were average in size; the peaches acted a good deal as on 18 and 19 in regard to dying out, and we planted a few pears but I don't know what proportion, but not as great as on 18 and 19. We put these pear trees in place of the peach trees that had died; I don't remember just when, excepting that it was some time in the spring, by instructions from the Harding Land Company. Mr. Wallace generally talked to me about the planting and care of Plat D.

The first year I was there I had a man with me that had a good deal of experience or claimed to have, and I think he had from the way he went at it, from California. His name was Walter Langford and he helped me about 2 months. A little later I had a Mr. W. D. Phillips who helped me most of that summer. He was what

(Testimony of F. S. Green.)

some people call an expert. I didn't know what an expert meant until he got there, but he had a great deal of experience in Colorado, planting and managing large orchards. He gave his attention to the proper handling of these lots and when anything was needed in the orchard he knew what it was, and if I didn't see it he was there to advise me about it.

I certainly tried as hard to do my work properly and produce a good orchard as I ever did anything.

I bought two lots—the bare land—from the Harding Land Company, but didn't enter into contract for cultivation. I signed up a similar contract aside from the cultivation. I planted one lot to apples and the other to peaches; they were 14 and 15. They were both planted in the spring of 1910. I have been cultivating them from year to year since planting and I think the success will average up with those on the rest.

I recognize defendant's exhibit 37 handed me; I should judge it was taken with the camera sitting in the road about half way east and west on these lots; that is the road between 14 and 17; right about the center looking in a rather northerly direction and I think it shows one of my lots and the other in the distance. The trees in the foreground are on lot 14 and the background is part of lot 15, which are my lots. This picture was taken just a few days before we came up here, by Mr. Clark and is the same time Mr. Zerker was testifying to.

Defendants' exhibit 38 is the second picture that was taken; as I said before the camera sat in the road, and when we took this picture the tripod stood still and we

(Testimony of F. S. Green.)

just turned the camera around and took this picture looking over 17 in a southerly direction.

Defendant's exhibit 39 was taken right across the road from lots 18 and 19; the camera sat in this 30 ft. road that goes out from the county road between 17, 18 and 19.

Q. In the road between 17, 18 and 19? Now, as between what lots?

A. Was numbering three on one side and 12, 13 and 14 on the other.

You can see the corner stake between 18 and 19, but as I remember it just a little bit east of the line because it gave the picture of two lots, not in full, but the main part, and after we took that picture the tripod wasn't moved at all, the camera just simply turned around and took this one looking north over 13.

EXAMINATION BY THE COURT.

That is, defendant's exhibit 40. I was going to tell the reason we didn't put the camera right on the line. We wanted to take a picture of this lot; you can see a little bit across between the lots where the low spots and that commences; that lot wasn't cultivated; we didn't want it across, but wanted to show the trees. Those trees are as large as those others and were planted in the spring of 1910. These branches without leaves that are seen sticking up in this picture are on the apple and pear trees that the grasshoppers ate the leaves off, and are the same trees that are in question in this case. The

(Testimony of F. S. Green.)

only way I can account for the grasshoppers is the same as in Kansas; the grasshoppers stay where the grass is; where the ground is cultivated there is nothing to eat on and they won't stay. These lots in question have lots of grass and weeds on, and of course, afford shelter for the grasshoppers, and as the grass dries up they work on the trees.

DIRECT EXAMINATION CONTINUED.

Lots 18 and 19 particularly have much darker soil than 17, and as you go across 18 it gets a little lighter as it goes toward the other side. My lot 14 is the same soil as 17 and a good deal the same as 18; I can see no difference at all in the looks or the way it handles. Lot 15 is the same as the rest, or 14 and 17; so I would say that 14, 15 and 17 are all alike, and I have demonstrated it by actual work and cultivation of the land.

I think there is a slight difference in comparing with 18 as it gets a little darker soil as it goes up towards the county road. I don't see any difference in the fertility of my lots and these lots, or in the matter of water and time of cultivation. You can cultivate 17 18 and 19 the same time of year you can cultivate 14 and 15; as a whole lots 17, 18 and 19 are not any wetter land than 14 and 15; there is a little spot of about half an acre on 19 that is wetter than these others, where there have been trees, but there is nothing but grass and weeds there now.

There is grass growing all over 17, 18 and 19 that some might call wire grass, but I wouldn't call it that

(Testimony of F. S. Green.)

myself. Assuming wire grass is grass growing all over wet or swampy land, there is no grass on these lots that indicate that kind of soil unless it would be in this half acre I spoke about. Besides the fruit trees on these three lots there are oats and a little timothy and a little clover; timothy and clover is mostly on 17 as I noticed, and another tall grass on the soil out there that we cut for hay, that I don't know, but it looks a little like cheat. These grasses make a good growth.

I farmed the land which lies immediately east of lot 17, which would be on lot 16, and raised good wheat there. Looking to the south of lot 17, on lot 22, I have never raised anything on that land; most of it was cleared since and planted to apples and peaches and there are a few peaches and apples *on it* now which have done finely. Lot 22 has not been too wet for orchard purposes.

There are good trees on lot 21, south of 18; it is too wet for peaches, but not for apples.

The natural drainage through the two tiers of lots, 12, 13, 14 and 15 and 19, 18 and 17 is southeasterly and is pretty gentle. In driving into the roadway between these two tiers of lots, I would call it a level tract of land; just a little gradual down hill as you come out in here.

I never saw lots 17, 18 and 19 overflowed or knew of such a thing. There might be this corner of 17 next to the creek that the water might get on a little bit. By the creek I mean that deep ditch, which comes right on the line, if I remember. It might overflow in extreme high water but I never saw it.

(Testimony of F. S. Green.)

I have seen freshets and high water in that country and saw the highest water around there since '67 and it didn't overflow 17 that I know of; I saw no indication of its overflowing.

As to surface drainage, the Harding Land Company put a ditch in along side of the road, starting in about lot 35 on west side of the road, and goes down the west side until its gets close to the corner of 12-19; crosses the road there and cuts the corner of this lot then comes out and angles just a little down through 19 and then down between two rows of trees and on down to the creek.

EXAMINATION BY THE COURT.

When they made the ditch, it was about $2\frac{1}{2}$ feet; now it is filled a little bit in some places and washed deeper in some places; I should judge it is washed to $2\frac{1}{2}$ or 3 feet through 19; in 18 a ditch that is plowed out would be some little deeper; a man that lived there told me he had plowed that ditch out; it starts in at 5 and through these lots, 10, 13, 18 and 21 down to the creek; that ditch was deeper of course at the creek and gradually run shallower up here and through these lots here. The hills extend around on the north; this is valley here and hills over here; this is drainage that has been done with the plow, except just furrows plowed on these particular lots, 18 and 19.

(Testimony of F. S. Green.)

DIRECT EXAMINATION CONTINUED.

The furrows are plowed to let off the little surplus water that might stand in little puddles around; they run out here on these next lots; when I was taking care of them I would plow the furrows clear out to the creek or to an outlet somewhere.

I have dug corner post holes four feet deep and found it wetter on the bottom than on the top; I don't see why water won't go through; I don't know how it got in there. I don't think it possible that the soil is impervious to water and I am sure the moisture goes through.

Plaintiff's Counsel: We are satisfied of that too.

Defendants' Counsel: All right, I am glad of it; thank you.

The first two years I cultivated there, I took the same kind of care of the lots as I did my own, but the last two years I had a little too much to do and neglected my own to take care of the others. To make these three lots successful orchard tracts after my period of cultivation was done, it was necessary that they have good cultivation, spraying and pruning.

I think this soil on these lots is better than the average in that community. I never heard or saw anything on any of these lots on plat D that could be called hardpan or joint clay that the water wouldn't go through.

I recognize all these photographs handed me; they were taken in the spring of 1914 by Mr. Clark of Roseburg and I was present when they were taken. They are

(Testimony of F. S. Green.)

correct representations or views of what they purport to represent.

Said pictures offered in evidence and marked defendants' exhibits 41, 42, 43, 44 and 45.

Exhibit 41 is a picture of lot 18 and that is my handwriting on the back; I think it was taken in April. The man standing in the picture is myself. The trees are some of those fruit trees on lot 18 that are referred to.

Defendants' exhibit 42 is a picture of lot 19 taken from the far side of the lot looking rather southeasterly and I am the man shown in the picture. I think my height is about 5 feet eleven.

Defendants' exhibit 43 is a picture of lot 12 and was taken at the same time just across the road from 19; they don't show up as tall as the others as they had been pruned in the spring and those others hadn't been pruned. The fruit trees shown are the trees in question in this case; the lot across the roadway is lot 12.

Defendants' exhibit 44 is a picture of the east side of lot 18; that is myself standing in there; it was taken at the same time as these others and shows some of the fruit trees in question in this case, on lot 18.

Defendants' exhibit 45 is a picture of lot 19 with the camera set in the same place as it did in taking the west side of lot 18, only this is looking the other way on lot 19 and shows some of the trees on lot 19 in question in this case.

These photographs give a fair average idea of the trees on these lots at the time the pictures were taken; we didn't attempt to pick out the best trees, and I think

(Testimony of F. S. Green.)

the pictures show all the trees, unless it would be right where the camera sat.

I was on plat D at the time Mr. Lundburg and the other gentleman—I suppose Mr. Kimball—came there in the summer, sometime of 1913. At that time there were a few clods on lot 17. I never saw anyone do any cultivation in orchard tracts in the spring of the year but what had some clods in the spring; as quickly as I had time to harrow and roll the orchard, the clods were gone; I rolled it with that corrugated iron roller which was my custom with reference to these lots while I was cultivating. After this treatment there were no clods there to speak of.

My object in cultivating the soil around fruit trees is to get it into a dust mulch, which I did with these lots. I did this with this identical lot 17 after these men were there.

One of these gentlemen *sopke* of getting his feet wet on some of this land on his visit in June, 1913, but there is no land there upon which he could have gotten his feet wet in the absence of an immediate shower, unless it might be this half acre to the west side of 19. Preceding their visit, the weather had been dry for a long time.

I have never seen anything on lot 17 or any of the other lots that could be called rock, stone or boulders; maybe in plowing we would hit a little stone, maybe two inches in diameter, but no stone scattered over the surface at any time.

I don't know anything about Mrs. Peterson's visiting the land in May, 1913.

(Testimony of F. S. Green.)

Since my time ceased on these lots the only thing done was the Harding Land Company hiring a man there; I suppose they did it for Mr. and Mrs. Hart, to look after lots 18 and 19 in 1913. He did a little; he pruned some of them a little bit, then he plowed up and down the rows, between five and seven feet wide, throwing the dirt up to the trees and left it that way. About two months after that he went over it with a single horse spring tooth cultivator, twice. I wouldn't call it adequate or proper cultivation; I wouldn't have given him anything for what he did, he did so little.

Nothing was done on 17 after the expiration of my stewardship.

Without counting, I should judge at this time, in going over these lots that there are about two or three dead apple trees to the acre; there is occasionally a dead pear tree, but not as great a number, according to the acre as there is of the apple trees. Of course, there are very few peach trees on the land. A few more peaches on 17 than on the other two lots, 18 and 19.

It wasn't over ten days after Mr. Lundburg and Mr. Kimball were there, that I got this ground into condition; there is quite a little difficulty in cultivating if you don't do it at the right time. More particularly on lot 19 than the rest; it is harder to handle; if it is done in the spring when it ought to be done, it is easy enough to cultivate, but let it dry off and it gets a little bit harder on the surface than 17 and 18.

This land is no different with reference to the way of handling it, or weather conditions, than ordinary soils.

(Testimony of F. S. Green.)

It is necessary to plow all soils at the right time to cultivate them. I don't believe even the river bottom soil can be neglected and plowed in the summer time without using a reavy disk plow and several horses. There might be some small patches that can be done, but I have found some sandy soil, when dry, almost impossible to plow.

I can recognize plaintiff's exhibit D-1 by the house-mover there; it is taken some place on plat D looking towards that hill over there.

Plaintiff's exhibit D-2, I was going to say is the same thing, but not so many trees here; the only thing is these houses over on the other side of hill, I guess down by the creek where some vacant lots are.

I do not remember plaintiff's exhibit D-3.

I would say plaintiff's exhibit D-4 was taken in the valley somewhere.

I do not recognize plaintiff's exhibit D-5. The clods shown in this picture do not look like the clods that were on lot 17 when these gentlemen, Mr. Lundburg and Mr. Kimball were down there. There are lots more big clods there; now when a disk goes over the land twice, one way and the other, it won't leave clods that large.

Court: I understand you hadn't been over this with a disk when these gentlemen were there, had you?

A. Maybe I don't make this plain, but I had disked this ground twice, but I hadn't rolled it.

On plaintiff's exhibit D-6 I recognize the log which I think is right to the line between 17 and 22, and this

(Testimony of F. S. Green.)

particular tall tree; there are two standing trees over on 22.

I am not positive whether or not the lot itself is on 17 or 22, but it is right in the vicinity. As I remember it is lying on the bank in some of the ditches there. I don't think it would interfere with cultivation; I don't remember its being in the way when we were cultivating. These two standing trees I am positive are not on lot 17. They are on lot 22.

I do not recognize plaintiff's exhibit D-7.

In plaintiff's exhibit D-8 I could recognize the picture as showing the valley above plat D, but I couldn't say where it was taken. I suppose it was looking at the valley.

The peaches had something we called curly leaf but I do not know whether or not it was technically curly leaf. The color of the foliage on the apple and pear trees on these lots from year to year was good; the apple has a dark green and as I remember the pears it is a lighter green. If a tree is not in good health it would be more of a yellowish color. The trees were in sound, healthy condition when my care for them ended.

The trees referred to in the testimony as being uncleared land on lot 17 would take in two rows of trees, or about a fifty or sixty foot strip, and ten feet wide. The trees displaced by this, I would say would be an apple and a peach in each row or four trees altogether.

I remember a man by the name of McCroskey; I met a man with Mr. Lundburg in June, 1914, but I don't remember the other man's name. I saw Mr. Mc-

(Testimony of F. S. Green.)

Croskey and the two gentlemen who testified as agricultural experts. I didn't see the county agriculturist, but Mr. McCroskey is this tall gentleman you spoke of. I think I saw him there in June, 1914, with Mr. Lundburg. I never saw the agriculturist before to my knowledge. I did not point the land out to either Mr. McCroskey or Mr. Lundburg or give them any directions. I saw Mr. Lundburg take part of the photographs introduced here in evidence; as near as I remember he held his camera down to get a view of the trees and the ground surrounding the trees, that is all I can tell you about it. I should judge there are $2\frac{1}{2}$ feet difference between the height he held his camera and the height of Mr. Clark's camera. Mr. Clark's was the higher.

The quality of the nursery stock planted on these lots was first class.

CROSS EXAMINATION.

I planted the same kind of trees on 14 and 15 as were planted on the rest of the tract; that is the way they were marked when they came from the nursery; they might come without true names. I fertilized the ground on my tract by putting on a little barnyard manure after it had been planted two years. Also a little of what some people call land plaster. Some say this is to sweeten the land and some say stimulated the wood growth—I don't mean wood growth, I mean growth of grasses; I put it on as an experiment. I didn't put any land plaster on the other tracts, but Mr. Harding's help that

(Testimony of F. S. Green.)

he had out there did; I don't remember how much they put on; I put on I think a thousand pounds on 20 acres as near as I can remember. I do not recall having told you that in caring for the other tracts they just sprinkled a little bit on.

They did not put any manure on 17 that I know of. I am not positive the land plaster was put on 17, only I know they aimed to put it on all of those lots. I couldn't say positively that it was put particularly on 18 and 19.

I remember saying in my testimony that wherever necessary outside the ditches the Harding Land Company made, I plowed furrows out; wherever a little puddle of water that will stand sometimes, I let that out by plowing furrows. If this soil had been soil through which water seeped rapidly, that is, free soil, so it could have under drainage those puddles wouldn't stand very long but I didn't want them to stand at all. I think it would be necessary to dig on any soil where we have rain like we have in Oregon, unless it be the sandiest soil we have.

The drainage ditch constructed by the Harding Land Company starts on the road in front of lot 35. It startso on the west side and runs across the roadway between 12 and 19. I couldn't tell without counting up how many acres lie west of the road here. The hills run back pretty well; here they come down closer to the road. They are fair size hills for Oregon.

(Testimony of F. S. Green.)

RE-DIRECT EXAMINATION.

Lots 11, 12 and 9 have had the same treatment as ours. Lot 12 had a little manure on it last winter or the winter before. Mr. Adair never put any manure on his. The soil of his lot is just the same as 17, 18 and 19; a little darker than 19.

RE-CROSS EXAMINATION.

The trees shown in defendants' exhibit 37 are peach trees and apples. The widest tree in the foreground is a peach tree and the one to the right is an apple tree; the one a little further back is a peach tree and the one next to the edge of the picture is an apple tree. The one just to the edge of the left of the picture is a peach tree. I never counted the peach trees that died on my tract but most of them are dead; possibly between one-third and one-fourth of the peach trees lived.

On 17, I should judge between a fourth and a fifth of the peaches lived; on 18 and 19 hardly any at all there. The soil on 18 is a little lighter than on 19; when you start right to survey the line may be the same color, but as you go down towards 17 it gets a little lighter. The only way I examined the subsoil is by digging into these ditches and digging the post holes. It is the same kind of soil with the exception of a little lighter in color as it gets down.

(Excused.)

(Testimony of L. B. Wallace.)

L. B. WALLACE,

A witness called on behalf of defendant, testified as follows:

I know the handwriting of Glenn D. Hart. Referring to defendants' exhibit 29, and to the entry under date of Monday, July 15, 1912, opposite No. 33, "Glenn D. Hart and wife" is written by Glenn D. Hart.

Plaintiff's Counsel: We admit that as his signature.

Defendants' Counsel: The entry is Glenn D. Hart, Deadwood, South Dakota. Let the record show it is offered and admitted in evidence and the particular entry is the signature of Hart under date of July 15, 1912.

I first came to Oregon, August, 1909; commenced work with W. C. Harding Land Company on September 6, 1909; worked with them in the office selling real estate and doing office work from September 6, 1909, until May 16, 1910. I then bought stock in the W. C. Harding Land Company and became secretary and treasurer of the company, occupying the office of secretary all the time until July or August 15, 1912, and treasurer part of that time. I wish to correct my self; I was secretary until the winter of 1912 and assistant secretary from that time on. I severed my connections entirely with the Harding Land Co. on August 15, 1915. I ceased to be a stockholder at that time and am not interested or connected with the company now, excepting as one of these land owners, defendants in this case.

(Testimony of L. B. Wallace.)

I came to have an interest in this land through the representations of Dr. G. C. Bradburn, when I came to Roseburg in 1909; this proposition was put to me to take the place of C. H. Carney, whom I happened to know, and I did so. I believe the original purchase of the first land owners was in July, 1909, and I bought in the latter part of September, 1909. Before buying I went with Mr. Green to Wilbur and looked over the land as thoroughly as it was possible to do in an afternoon, and went back to Roseburg and invested. I satisfied myself that this land, which was afterward platted as Plat D was first class fruit land. My interest in this matter was absolutely in good faith. My interest was \$2200.00 or one quarter.

As an officer of the company I had general supervision over the cultivation of several of their plats. I gave the general instructions to the man in charge of the plats. Confining myself to plat D this would be Mr. Green. Mr. Phillips was the first man there representing the company, who was a tree expert from Colorado, having had experience in Grand Junction, which is a celebrated apple growing district. He was there approximately a year; he was hired by the W. C. Harding Land Co. and acted as an expert, going over the entire Plat D, pruning the trees and giving them what expert care they needed and seeing that they received proper attention.

After Phillips, we had Mr. Wright, a tree expert having had a great deal of experience in Eastern Oregon, and in fact over the Northwest, Oregon and Wash-

(Testimony of L. B. Wallace.)

ington both. His first name was George. I do not know where either he or Phillips are now.

Mr. Wright did the same as Mr. Phillips, having charge of the trees, looking after the growth of the trees, to see that they were properly pruned, and the proper spray used and that they had the proper care.

I can't say how often I visited Plat D after the planting began; I was out there off and on all the time; that is, I was going out there very frequently to see that the work was progressing properly and that Mr. Green was living up to his part of the contract. I found the work done on 17, 18 and 19, generally speaking, good.

Tracts 18 and 19 were planted in the spring of 1910. The work consisted of cultivation of the ground, plowing and the disking and harrowing and general cultivation of the soil. The trees themselves had the proper pruning and spraying that young fruit trees ordinarily receive.

From year to year I observed the condition and appearance of the trees on 18 and 19. The apple trees were healthy but the peach trees didn't do good after the first year. When we planted 18 and 19 in the spring of 1910, we planted them according to the contract, apples and peach fillers. The peach trees made a very satisfactory growth, and we found later on at the end of the year, in the winter of 1910, 1911 that the peach trees wouldn't grow successfully in this soil. I took the matter up with Mr. Glenn D. Hart when he was there in the winter of 1911, and he instructed us to plant—that is, I am a year ahead of myself in this. We

(Testimony of L. B. Wallace.)

thought that the peach trees would grow after they had had a year's growth on these two lots, 18 and 19, and in the spring of 1911 we replaced the few peach trees that had died with new peach trees, and we didn't satisfy ourselves until 1912 that peach trees wouldn't make a satisfactory growth in this land. So we first took the matter up with Mr. Hart in February, 1912, I think. This was in the office of the Harding Land Company at Roseburg; Mr. Hart was acting as one of the sales managers for the Harding Land Company and was after he had become a stockholder.

Mr. Hart said to go ahead and replace the dead peach trees with pear trees. The peach trees that had not died were not replaced. This arrangement referred to both lots 18 and 19. After that we planted trees, replanting the dead peach trees with pear trees in the spring of 1912.

I believe Mr. Hart first saw these lots, 18 and 19 in 1911. I was acquainted with Mrs. Hart but not Mrs. Peterson and had never seen her before this trial.

Mr. Hart was also second vice president of the Harding Land Company for a time.

I remember Mr. and Mrs. Hart visiting Roseburg in July, 1912, and going out to Plat D, but don't know who took them out. I heard the testimony to the effect that I had taken them out, but I did not, and never took them out to plat D that I remember of. I never had any conversation with them about substituting Garden Valley land for their orchard. I showed the Harts over the Umpqua Valley pretty generally after their first

(Testimony of L. B. Wallace.)

day or two at Roseburg but I can't say as to whether I went to Garden Valley or not. If I did, it had no reference whatever to exchange of Garden Valley land for Plat D land. I had a talk with them in July, 1912, with reference to their Plat D land and they seemed to be perfectly satisfied with this exception Mrs. Hart seemed to be disappointed that the peach trees had not proven to be satisfactory on these tracts, but when I mentioned to her the fact that Mr. Hart had instructed us to plant pear trees, she seemed to think that the company had done all they could do, and apparently was satisfied. Neither one of them told me that they were dissatisfied with these lands, to my knowledge.

No one who ever purchased any land in Plat D, through our company ever indicated to my company or myself in any way, any dissatisfaction with the soil in Plat D.

The chief failure or difficulty on Plat D was the peach trees; the pears and apples on 18 and 19 were good. I saw them often during the time of the Harding Land Company's contract to keep them cultivated. The last I remember having seen these tracts was in the summer of 1912 and their condition was good.

I had a conversation with Mr. Hart in 1912 I believe, regarding the payment for 18 and 19 and he talked and acted for Mrs. Hart in the matter. He said that they would take care of them just as soon as it was possible to do so. He made no complaints about not being satisfied.

From my experience I would say that the land on

(Testimony of L. B. Wallace.)

lots 17, 18 and 19 is first class land for apple and pear trees. I am familiar with the black mud in the Umpqua Valley and do not think there is anything on either of those lots of that character. I have been over the lots pretty thoroughly and satisfied myself as to the depth of the soil when I first went out to see the lands.

The appearance of the foliage on 18 and 19 as I saw them from time to time was dark green. Lot 17 was planted in the winter of 1910-1911.

It was shown in evidence here, that the contract with Mrs. Peterson for lot 17 was dated in October, 1910, and the contract acknowledges receipt of a payment in April, 1910; this was due to the fact that the first two payments of Mrs. Peterson were not sufficient to justify the Harding Land Company to enter into a \$3500 contract and we refused to issue a contract until a sufficient amount of money had been paid which justified us in going ahead and planting Mrs. Peterson's lot. When the contract was issued she had then paid sufficient for us to go ahead. I think 17 was actually planted in the latter part of the winter of 1910-1911, that is, I mean possibly in February. It was planted to peaches and apples.

The Harding Land Company always purchased the best trees that we could buy, buying from four to six foot trees and we put that kind of trees on those lots. The same work was done to care for 17 as on the balance of the plat D. The pear trees were planted on 17 at the instruction of Mr. Glenn D. Hart. I asked him as to the replacing of the dead peach trees with pears on

(Testimony of L. B. Wallace.)

Mrs. Peterson's tract shortly after he instructed us to plant pear trees on Mrs. Hart's two tracts, and he said to go ahead replacing the dead peach trees with pear trees and he would vouch that it would be perfectly satisfactory with Mrs. Peterson. I knew he was an old acquaintance and friend; I don't know whether he mentioned it at that time or not. In accordance with this, I gave instructions to people on the ground to plant pear trees.

There has been some testimony that I apologized for the condition of the land to Mr. Hart and his wife in July, 1912, but I did not.

I have never seen any evidence of any rocks on any of this land, particularly lot 17.

I know of the orchard that failed across the road from the fair ground near Roseburg; there was shell rock probably within six or eight inches of the surface of the ground, which is well known in that locality.

I am familiar with the contents of the pamphlets, plaintiff's exhibits H and I and to the best of my knowledge and belief the statements in them are true. In plaintiff's exhibit H, it states that one box of peaches could be produced on peach trees the third year.

CROSS EXAMINATION.

At the time I went out and looked at the Jack Chenoweth land, my object was to purchase it and after looking it over I was satisfied with the appearance of it.

I am not an experienced man in soils, or a farmer

(Testimony of L. B. Wallace.)

and my only experience in managing and developing orchards was in the Umpqua Valley and only in an office way. My object particularly was a good investment and good returns on my money and from that point of view, I thought this looked good, and that was my object naturally in going into it, to make money on the investment. I was particular as to what kind of land it was and wanted to get my moneys' worth before buying it.

I said I took this matter up with regard to peach and pear trees with Mr. Hart in February, 1912, and was acting secretary at the time; Mr. Hart was second vice president, I believe. He was not second vice-president, before he became sales manager.

I would have to go through defendant's exhibit 1 to identify it absolutely, but that is my signature and the date is March 2, 1912, so Mr. Hart was not a sales manager at the time I took up this question of changing the peach trees to pear trees.

I am absolutely positive that I talked with Mr. Hart in regard to making the change in planting out there at that time and have a distinct recollection in regard to it; we were in the office at the time. I do not remember of any communications by way of letters that passed and think we made that arrangement in February, 1912. The orchard was first planted in the spring of 1910. We renewed the dead peaches the second time the first year. Mr. Hart instructed us at that time to substitute pear trees for dead peach trees. Up to this time I had never met Mrs. Hart. I first met her in the summer of 1912,

(Testimony of L. B. Wallace.)

in the office of the W. C. Harding Land Company, Roseburg, Oregon, in July, I believe. They were there at least several days, if not a week or such a matter. I do not remember what part of the week. I said on my examination that I did not take them out to the tract at that time. I am positive I do not remember a third party with Mr. and Mrs. Hart. It is not a fact that at that time I took Mr. and Mrs. Hart and this third party out to this tract in an automobile and showed them the 17, 18 and 19 tracts. I don't know that I took them over to Garden Valley at that time; I took them over the valley generally but I am not sure we went to Garden Valley. That was during that visit; Mrs. Hart had not been there during any other visit to my knowledge prior to that. At that time Mr. Hart expressed satisfaction with the way the trees were growing and doing, outside of the peach trees; we were all disappointed that the peach trees didn't do good on these lots.

I have no knowledge of the fact as to who Mr. and Mrs. Hart went out to the lots with. It is possible they went out alone.

I talked with them about their lots at the time. There wasn't a great deal said except that he expressed satisfaction in regard to them. I can't remember his remarks, just in a general way as to what he said. There was no complaint; they seemed to be pleased with their investment and pleased with the growth the apple trees had made. Mr. Hart instructed me to substitute pear for peaches, while on that visit. I don't know how long it extended, but he got there sometime during the month

|(Testimony of B. L. Eddy.)

of February. I don't remember that we ever had any communication from Mrs. Peterson relative to doing anything of that kind.

B. L. EDDY

A witness on behalf of defendants, testified as follows:

DIRECT EXAMINATION.

|I was trustee for the owners of Plat D only; I had nothing to do with the Harding Land Company, except representing the owners of Plat D.

I have met Glenn D. Hart here. I think the only time I met Mr. Hart was in my office at Roseburg. I couldn't state when, but I am quite sure it was after a letter which he wrote me, which was introduced in evidence here, which was written from Dakota; some months after that he came into my office, and was probably brought in by somebody from the Harding Land Company. My recollection is that that letter was written in June, 1912; it is in evidence here. |I had some conversation with him about Mr. and Mrs. Hart's tracts; that was his object in coming; he came to see me about these payments as |I had given him two or three notices to pay. The gist of his conversation was that he was short of money and would take care of it later. He made no proposition of dissatisfaction with the lots at all.

(Testimony of Glenn D. Hart.)

GLENN D. HART,

Recalled in rebuttal by plaintiff, testified as follows:

DIRECT EXAMINATION.

I heard the testimony of Mr. Zercher. I have met him at Roseburg. I never had a conversation with him regarding these lots, and he was never present at any time I was talking with Mr. Harding about them.

I heard the testimony in regard to my authorizing him to plant pears and will say that I never authorized him to plant pears on these tracts and never talked to him about pears that I ever remember, or authorized him at any time to plant pears on the Peterson tract that I ever remember.

THAT AFTERWARDS, to-wit, on the 19th day of October, 1914, the Honorable R. S. Bean, District Judge, before whom this cause was tried, rendered the following oral opinion which was thereafter duly filed in said Court and Cause, and which is in words and figures as follows, to-wit:

The case of Hart v. the Harding Land Company, et al., was a suit brought in this court to set aside three contracts entered into between the plaintiff and her assignors, and the Harding Land Company for the purchase of certain lands in Douglas County. It appears from the testimony that some time prior to 1910, the

individual defendants, Adair and others, purchased a tract of land consisting of about 400 acres near Wilbur in Douglas County, with the understanding that the land should be divided by the Harding Land Company into small tracts and sold as fruit land, that the proceeds of the sale should be appropriated, as I recall the testimony, to the reimbursing of the individual defendants for the amount they had paid on the purchase price of the property and to take care of a mortgage that they gave for deferred payments, and the balance should be divided between the parties in a certain manner immaterial to the questions now involved. The Harding Land Company thereupon proceeded to divide this land into small tracts and put it on the market as fruit land. As customary, or not unusual—perhaps not customary but not unusual in such corporations—it proceeded to offer this land for sale outside of the State of Oregon, and to people who were not familiar with the locality. It had an agent who made sales in Dakota and Colorado, and he sold or contracted to sell to the plaintiff and her assignors one each of the ten-acre tracts of land for \$350.00 an acre, under an agreement with the Land Company to set the land out to fruit trees, apples and peaches, to cultivate it for three years, and to turn it over at the end of the three years to the purchasers in good condition. The plaintiff alleges that to induce them to enter into this contract this agent represented to them that this land was worth \$350.00 an acre, that it was choice orchard land, that it had been examined by an expert orchardist and that the result of such examination showed that it was peculiarly adapted to the growing of

fruit trees, that the soil was sandy loam and easily cultivated, well drained and needed no irrigation. At the same time he exhibited to these intending purchasers some literature issued by the company, in which it was stated that the peach trees were to stay between the rows of apple trees until they crowded them out, and that they were planted because in the Umpqua Valley this crop practically never failed, that peaches began to yield in three years, two or three boxes from each tree the third season, producing so prolifically as to provide an income sufficient for a living and enough in addition to make the payments on the purchase price of the land. The plaintiff, relying upon these statements, entered into the contract and made the first payment. While they were negotiating they suggested that probably they should come to Oregon and see the land before closing the contract but they were assured that was unnecessary, that they could rely upon the statements of the agents and representations of the company, and that the expense of a trip to Oregon would be useless. Relying upon these statements, they entered into these contracts and made the first payments. Some two or three years later they came to Oregon, did not find the land in the condition they expected to and brought this suit to set aside these contracts on the ground of fraud.

Now, I am not going to attempt to review the testimony in this case. It is sufficient that in my judgment the allegations of the complaint are sustained. It is admitted by the defendants that the land is not suitable to growing peaches and that the peach trees died, and that was one of the material inducements evidently op-

erating on the minds of these purchasers to persuade them to enter these contracts, the fact that, as represented, in three years at the time the contract expired and they received the land, the peach trees would be bearing fruit sufficient to make the subsequent payments, and this is admitted to have been untrue and the land wholly unsuited to growing peaches. There is a great conflict in the testimony as to whether the land was suitable for apple growing. Two gentlemen, one of them the agriculturist of Lane County, visited this property, made a physical examination, and each of them testified that in his judgment it was not suitable for apple growing. The evidence shows that it is a fine clay soil, largely impervious to water, not easily cultivated and is not the general character of land which one would expect to be exploited for orchard purposes.

The defendant produced a good many witnesses to testify that in their opinion it would produce good orchards, but it was a striking feature in the case that no witness was produced who testified that he knew of any profitable commercial orchards growing in Douglas County on such land. And, under the circumstances of this case I think, in the first place, that where exploiting companies make representations of this kind to intending purchasers outside the state and persuade them not to examine the land, they ought to be held to strict accountability, and the judgment of this court is that the plaintiff is entitled to a decree setting these contracts aside, and a judgment against the Land Company for the money they have paid on them, and for the costs of this proceeding.

AND AFTERWARDS, to-wit, on the 9th day of November, 1914, the Honorable R. S. Bean, District Judge, before whom this cause was tried, rendered the following supplemental oral opinion, which was thereafter duly filed in said Court and Cause and which is in words and figures as follows, to-wit:

The case of Hart vs. Harding Land Company was tried and determined some time ago and a decree ordered entered against the Land Company and in favor of the plaintiff, setting aside certain contracts and requiring the Land Company to repay the plaintiff money paid thereon. A motion was made to have the decree include the owners of the land which the Land Company agreed to sell to the plaintiffs, but I do not think that under the facts and law in the case a personal judgment should go against the land owners for the money received by the Land Company on this contract of sale. The contract was made between the plaintiffs and the Land Company and the owners of the land were not parties to it; they are not disclosed as interested in the matter in any shape, manner or form; there was no contract between them and Mrs. Hart or her assignors and I can see no reason, under the circumstances in this case, why they should be now required to pay back the money that was received from Mrs. Hart and her assignors, by the Land Company under the false and fraudulent representations made.

.

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto, by their respective counsel, that the foregoing is a statement of the case showing how the questions arose and were decided in the District Court of the United States for the District of Oregon, and setting forth so much only of the facts alleged and proved or sought to be proved, as is essential to a decision of such questions by the Circuit Court of Appeals for the Ninth Circuit, and that the same ^{when} ~~were~~ filed with the Clerk of the District Court of Oregon and approved by said District Court or the Judge thereof, shall be treated as superseding for the purposes of the appeal, all parts of the record in this Cause other than the decree from which the appeal is taken, and together with such decree shall be copied and certified to the Circuit Court of Appeals for the Ninth Circuit as the record on appeal.

And it is FURTHER STIPULATED and AGREED that the Clerk of the District Court shall transmit to the Clerk of the Circuit Court of Appeals, the original of the following exhibits introduced in evidence, the same to be regarded as constituting a portion of the record on appeal, as follows, to-wit:

Plaintiff's Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, and D-8 respectively, and

Defendants' Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 respectively.

Portland, Oregon, August 17, 1915.

E. A. Lundburg,
Counsel for Appellants Hart.

O. P. Coshow,
Counsel for Appellant
W. C. Harding Land Company.

B. L. Eddy,
Counsel for Respondents Adair,
Epperly, Burns, Green and Wallace.

PURSUANT TO and in ACCORDANCE
WITH the foregoing stipulation between the parties
hereto, dated August 17, 1915, the foregoing statement
of the case IS HEREBY APPROVED.

And PURSUANT to said stipulation it is OR-
DERED that the original Exhibits introduced in evi-
dence in this Cause and described in said stipulation shall
be transmitted to the Clerk of the Circuit Court of Ap-
peals as a part of the Record on Appeal.

Dated August 23, 1915.

R. S. Bean,
Judge.

Filed August 23, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 9th day of
November, 1914, the same being the 7th judicial day of
the regular November term of said Court; Present, the
Honorable Robert S. Bean, United States District

Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

This cause came on to be heard at this term of Court on the pleadings filed and evidence taken herein, and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz.:

First; That the purchase of Lot Eighteen (18) of Plat "D" of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefore dated March 24, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect, and

That plaintiffs do have and recover of and from the W. C. Harding Land Company the money advanced in payments on said purchase and on account of said contract; the sum of Seven Hundred Dollars, with interest thereon at the rate of six per cent. per annum from the 24th day of March, 1910, until paid, and for the further sum of Three Hundred Fifty Dollars, with interest thereon at the rate of six per cent per annum from June 2, 1911, until paid, and for the further sum of Four Hundred Dollars, with interest thereon at the rate of six per cent per annum from April 16, 1912, until paid, and for the further sum of Eight and seventy five one-hundredths Dollars, with interest thereon at the rate of six

per cent per annum from April 3, 1911, until paid, and for the further sum of Eight and seventy five one-hundredths Dollars, with interest thereon at the rate of six per cent per annum from April 3, 1912, until paid:

Second: That the purchase of Lot Nineteen (19) of Plat "D" of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contracts therefor, dated March 24, 1910, entered into between Glenn D. Hart, and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23, 1912, to Mrs. Glenn D. Hart, by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect, and

That plaintiffs do have and recover of and from the said W. C. Harding Land Company the money advanced in payments on said purchase and on account of said contract, the sum of Seven Hundred Dollars with interest thereon at the rate of six per cent per annum from the 24th day of March, 1910, until paid, and the further sum of Seven Hundred Dollars with interest thereon at the rate of six per cent per annum from the 2nd day of June, 1911, until paid, and for the further sum of Eight and seventy-five one-hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1911, until paid, and for the further sum of Eight and seventy-five one hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1912, until paid;

Third: That the purchase of Lot Seventeen (17) of Plat "D" Roseburg Home Orchard Tracts, Douglas

County, Oregon, and the said contract therefor, dated October 15, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company, and thereafter duly assigned under date of to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect;

That plaintiffs do have and recover of and from the W. C. Harding Land Company, the money advanced in payments on said contract, the sum of One Hundred Dollars with interest thereon at the rate of six per cent per annum from April 15, 1910, until paid, and for the further sum of Three Hundred Dollars with interest thereon at the rate of six per cent per annum from May 15, 1910, until paid, and for the further sum of Four Hundred Dollars with interest thereon at the rate of six per cent per annum from November 1, 1910, until paid, and for the further sum of Twenty-five Dollars, with interest thereon at the rate of six per cent per annum from December 1, 1910, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from Jan. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1911, until paid; and for the further sum of Twenty-five Dollars,, with interest at the rate of six per cent per

annum from May 1, 1911, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from June 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from July 1, 1911, until paid; and for the further sum of Twenty-five Dollars with interest at the rate of six per cent per annum from Aug. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Sept. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Oct. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Nov. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Dec. 1, 1911, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Jan. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from May 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum

from June 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from July 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Aug. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Sept. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Oct. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Nov. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Dec. 1, 1912, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Jan. 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from Feb. 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from March 1, 1913, until paid; and for the further sum of Twenty-five Dollars, with interest at the rate of six per cent per annum from April 1, 1913, until paid; and for the further sum of Fifty Dollars with interest thereon at the rate of six per cent per annum from May 1, 1913, until paid; and for the further sum of Eight and forty-nine one-hundredths Dollars with interest thereon at the rate of six per cent per annum from April 3, 1911, until paid;

Fourth: That in addition to the total of said respective sums of money with interest thereon as set out, to-wit, \$5473.81; that plaintiffs further do have and recover of and from the said W. C. Harding Land Company, their costs and disbursements incurred in this suit, taxed at \$135.60, for which execution will issue.

Dated at Portland, Oregon,
November 9th, 1914.

R. S. Bean, Judge.

Filed November 9, 1914, G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of April, 1915, there was duly filed in said court and cause a petition of plaintiffs for appeal in words and figures as follows, to-wit:

PETITION OF PLAINTIFFS FOR APPEAL.

To the Honorable R. S. Bean, District Judge, the
Judge before whom said cause was tried:

The above named plaintiffs, Mrs. Glenn D. Hart and Glenn D. Hart, conceiving themselves aggrieved in part by the decree made and entered herein on the 9th day of November, 1914, in the above entitled cause, do hereby appeal from said decree and order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith and they pray that the appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and

papers on which said decree was made, duly authenticated, may be sent to the United States Circuit Court of appeals for the Ninth Circuit.

E. A. Lundburg,
Attorney for Plaintiffs.

And now, to-wit: On April 14, 1914, it is ordered that the appeal be allowed as prayed for.

R. S. Bean,
District Judge.

Filed April 14, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 14th day of April, 1915, there was duly filed in said Court and cause, an Assignbent of Errors, in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Comes now the plaintiff and assigns the following errors by the Court in the decree herein entered November 9th, 1914, to-wit:

I.

In failing to decree that plaintiff was entitled to have relief against the individual defendants, Walter Adair, J. T. Epperly, James B. Burns, F. S. Green and L. B. Wallace, owners of the land involved, as prayed for in the bill of complaint.

II.

In failing to include in the decree a personal judgment against the individual defendants, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, for the return of the money paid on each of the several contracts issued by the W. C. Harding Land Company to the plaintiff and her assignors.

III.

In over-ruling plaintiff's motion to include in the decree when entered, a personal judgment for \$5473.81 against Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace, the individual defendants.

IV.

In failing to enter a decree granting plaintiff relief against all of the defendants as prayed for in the complaint.

V.

In failing to enter a decree broad enough to grant to plaintiff all of the relief to which she is entitled under the law and the evidence.

WHEREFORE, the plaintiff prays for the correction of the foregoing errors and that the decree be modified accordingly and that plaintiff be granted relief according to the prayer of her complaint.

A. E. Lundburg,
Attorneys for Plaintiffs.

Filed April 14, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 19th day of April, 1915, there was duly filed in said Court and cause a Bond of Plaintiffs on Appeal in words and figures as follows, to-wit:

BOND ON APPEAL.

Know all men by these presents, That we, Mrs. Glenn D. Hart and Glenn D. Hart and National Surety Company of New York are held and firmly bound unto Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace in the sum of two hundred and fifty dollars, to be paid to the said Walter Adair, J. P. Epperly, James P. Burns, F. S. Green and L. B. Wallace, executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by, these presents.

Sealed with our seals, and dated April 19, 1915.

Whereas, the above named Mrs. Glenn D. Hart and Glenn D. Hart have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the in the above entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Mrs. Glenn D. Hart and Glenn D. Hart shall prosecute said appeal to effect, and answer all costs, if he shall fail to make good his

plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Mrs. Glenn D. Hart,

Glenn D. Hart,

By E. A. Lundburg, their Attorney in Fact.

Signed, sealed and delivered in presence of:

(Seal, National
Surety Company)

National Surety Company,

By Jas. McI. Wood,
Its Attorney in Fact.

Subscribed and sworn to before me this. 189. .

Filed April 19, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of April, 1915, there was duly filed in said court, and cause, a Petition of W. C. Harding Land Company for Appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

To the Honorable R. S. Bean, District Judge:

The above named defendant W. C. Harding Land Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 9th day of November, A. D. 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignment of Errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record pro-

ceedings and documents upon which said decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

W. C. Harding Land Company,
By O. P. Coshow, its Attorney.

State of Oregon,
County of Multnomah—ss.

We hereby accept service of the foregoing Application for an Appeal in said County and State and hereby waive the issuance and service of a Citation in said Appeal this 28th day of April, A. D. 1915.

E. A. Lundburg,
Attorney for Plaintiffs.

B. L. Eddy,
Attorney for Defendants Walter Adair, J. T. Epperly,
James P. Burns, F. S. Green and L. B. Wallace.

Appeal allowed this April 28, 1915, and bond fixed at \$250.00.

R. S. Bean,
Judge.

Filed April 28, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of April, 1915, there was duly filed in said Court and cause, an Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Now comes the above named defendant W. C. Harding Land Company, a corporation, in the above entitled cause and filed the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made in this Honorable Court on the 9th day of November, 1914:

I.

That the United States District Court for the District of Oregon erred in decreeing the following, to-wit:

First: That the purchase of lot eighteen (18) of Plat D of Roseburg Home Orchards Tracts, Douglas County, Oregon, and the said contract therefor dated March 24, 1910, entered into between Mrs. Glenn D. Hart and the W. C. Harding Land Company, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

II.

In decreeing that the plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in the payments on the purchase contract mentioned in the Assignment of Erros No. 1 herein.

III.

Second: That the purchase of lot Nineteen (19) of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and the said contract therefor, dated March 24, 1910, entered into between Glenn D. Hart and the W. C. Harding Land Company, and thereafter duly assigned under date of April 23, 1912, to Mrs. Glenn D. Hart by said Glenn D. Hart, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

IV.

In decreeing that the plaintiffs have and recover from the said W. C. Harding Land Company, defendant, the money advanced in payments on said purchase and on account of said contract mentioned in Assignment of Error No. 3 herein.

V.

Third: That the purchase price of lot 17 of Plat D of Roseburg Home Orchard Tracts, Douglas County, Oregon, and said contract therefor, dated October 15, 1910, entered into between Mrs. Ella Peterson and the W. C. Harding Land Company, and thereafter duly assigned under date of to Mrs. Glenn D. Hart, by said Mrs. Ella Peterson, be and the same hereby are annulled, rescinded, cancelled and declared to be utterly void and of no effect.

VI.

In decreeing that plaintiffs have and recover off and from the W. C. Harding Land Company the money advanced in payments on said contract and purchase mentioned in Assignment of Error No. 5 herein.

VII.

Fourth: In rendering a decree and judgment in favor of plaintiff for the sum of \$5473.81 and for plaintiffs' costs and disbursements taxed at——.

VIII.

In not rendering a decree in favor of the defendant W. C. Harding Land Company and against the plaintiffs, and dismissing plaintiffs' Bill in Equity.

IX.

In not rendering and entering a judgment in favor of the defendant W. C. Harding Land Company and against the plaintiffs for the costs and disbursements incurred by said W. C. Harding Land Company in the trial of the above entitled cause.

WHEREFORE, the appellant prays that said decree be reversed and that said District Court for the District of Oregon be ordered to enter a decree reversing the decision of the lower court in said cause.

O. P. Coshow,
Attorney for W. C. Harding Land Company, Appellant.

Filed April 28, 1915. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 6th day of May, 1915, there was duly filed in said Court and cause, a Bond on Appeal in words and figures as follows, to-wit:

BOND ON APPEAL.

Know all men by these presents, That we, W. C. Harding Land Company, a corporation, as principal and The American Surety Company of New York, a corporation, as surety, are held and firmly bound unto Mrs. Glenn D. Hart and Glenn D. Hart, the above named plaintiffs in the full sum of Two Hundred (250) Dollars, to be paid to the said plaintiffs, their heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with out seals and dated this 5th day of May in the year of our Lord Nineteen Hundred and Fifteen.

Whereas, the above named W. C. Harding Land Company has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to reverse the decree of the District Court for the District of Oregon, in the above entitled cause.

Now, therefore, the conditions of this obligation are such that if the above named W. C. Harding Land Company shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obliga-

tion shall be void, otherwise to remain in full force and effect.

W. C. Harding Land Company,
By O. P. Coshow, its Attorney.

Attest:

Sylvia J. Brown,
Assistant Secretary.

(Seal)

American Surety Company of New York,
By W. J. Lyons,
Resident Vice President.

(Seal)

Attest by

N. A. King,
Resident Asst. Secretary.

W. J. Lyons,
Agent.

Approved by

R. S. Bean,
Judge.

Filed May 6, 1915. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in said Court in which Mrs. Glen D. Hart and Glen D. Hart are plaintiffs and appellants, and the W. C. Harding Land Company, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace are defendants, and the said Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace are appellees, and in which the said the W. C. Harding Land Company, defendant, is appellant, and the said Mrs. Glen D. Hart and Glen D. Hart are appellees, in accordance with the law and rules of this Court, and in accordance with the stipulations of the parties filed in said cause, and that said record is a full, true and correct transcript of the record and proceedings had in said Court in said cause in accordance with the said stipulations, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$_____ for clerk's fees for preparing the said transcript, and \$_____ for printing said transcript, and that \$_____ of said cost has been paid by the said appellants, Mrs. Glen D. Hart and Glen D. Hart, and \$_____ of said costs has been paid by said appellant, the W. C. Harding Land Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this ——— day of November, 1915.

Clerk.

